Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

KENNECOTT UTAH COPPER CORPORATION,

Petitioner,

v.

GEORGE BECKER; WAYNE HOLLAND, JR.; TOM PERFILI; SUBDISTRICT 5 UNITED STEELWORKERS OF AMERICA; LOCAL 392 UNITED STEELWORKERS OF AMERICA and UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does a labor arbitration award violate a public policy expressed in statute and federal precedent promoting a drug-free workplace where the employer and union have agreed that the employer may discharge any employee who tests positive for drugs, and the award orders the employer not to discipline such employees under the agreement without evidence of on-the-job impairment, possession or use?

Is a labor arbitration award enforceable where the employer and union have agreed that the employer may discharge employees who test positive for drugs and where the collective bargaining agreement limits the arbitrator's authority to add terms, but the award orders that the employer may not discipline employees who test positive without evidence of on-the-job impairment, possession or use?

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Kennecott Utah Copper Corporation, is a wholly-owned subsidiary of Rio Tinto, p.l.c. Rio Tinto, p.l.c. is a publicly held company.

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STATEMENT OF JURISDICTION

The Tenth Circuit Court of Appeals issued its opinion and order in this case on October 29, 1999. Petitioner did not seek rehearing before the Court of Appeals. This Court has jurisdiction to review this order on a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED IN THE CASE

Utah Code Ann. §§ 34-38-1 through 34-38-15 (1997). (App. at 41a.)

STATEMENT OF THE CASE

A. Factual Background.

Petitioner Kennecott Utah Copper Corporation ("Kennecott") operates the country's largest copper mine, a surface truck and shovel operation. Its employees routinely operate dangerous heavy equipment. Kennecott and

respondents Subdistrict 5 and Local 392 of the United Steelworkers of America (collectively, the "Union") were parties to a collective bargaining agreement ("CBA") and to a Memorandum of Understanding ("MOU") entitled "Drug and Alcohol Abuse Policy." (App. at 27a.) The individual respondents are officers or agents of the Union.

On July 26, 1996, a Kennecott employee and Union member ("the grievant") was driving a fully loaded ten-wheel dump truck when it crashed through an earthen berm and turned over. (App. at 27a.) The grievant's supervisors investigated the accident. (*Id.*) They determined that a mechanical defect caused the accident, but that the grievant had contributed by not applying his brakes in a timely manner. (*Id.*)

Pursuant to the MOU, the supervisors directed the grievant to take a drug test. (App. at 28a.) The initial drug test, as well as a second test requested by the grievant, showed the presence of cannabinoids, indicating that the grievant had smoked marijuana. (*Id.*) Kennecott discharged the grievant for violation of the MOU. (*Id.*)

The MOU is based on the language of the Utah Drug and Alcohol Testing statute (the "Code"), Utah Code Ann. § 34-38-1 through § 34-38-15 (1997). The Code promotes "safe working conditions free from the effects of drugs and alcohol" by expressly permitting employers to "test employees or prospective employees for the *presence* of drugs or alcohol. . . ." (App. at 41a, 43a [emphasis added].) The testing "need not be limited to circumstances where there are indications of individual, job-related impairment of an employee or prospective employee." (*Id.* at 46a.) Provided that testing follows the employer's written policy, "an employer may use [a positive] test result . . . as the basis for

disciplinary or rehabilitative actions, which may include . . . termination of employment. . . ." (*Id.* at 46a-47a.) The Code limits employers' liability for disciplining employees based on drug tests. An employee may not sue an employer for damages arising from discipline or discharge based on the drug policy, unless the employer unreasonably relies on a false test result. *(Id.* at 48a.)

The MOU, like the Code, announces a policy of "provid[ing] a safe workplace for all [Kennecott] employees . . . free from the effects of alcohol and drugs. . . ." (App. at 33a.) The MOU prohibits "[w]orking while under the influence of drugs or alcohol or *while not being free from the presence of drugs*." (*Id.* at 34a [emphasis added].) "*Any positive drug or alcohol test* or any refusal to submit to such test *is a violation* of this Policy." (*Id.* at 35a [emphasis added].) The MOU also sets the standards for a "positive" drug test. (*Id.* at 36a.) Finally, the MOU sets forth the consequences of violating the policy: "Compliance with this policy is a *condition of employment.* The Company intends to take *disciplinary action, up to and including termination,* against any employee who violates this Policy." (*Id.* at 38a [emphasis added].)

The grievant grieved his discharge and, pursuant to the CBA, an arbitrator heard the unresolved grievance.

B. The Arbitration Award.

The parties stipulated to the issue before the Arbitrator: "Did the Company have just cause to terminate the Grievant, as the term 'just cause' is used in the Collective Bargaining Agreement and interpreted in accord with other agreements of the parties, including the Drug and Alcohol Abuse Policy. And, if not, what is the proper remedy?" (App. at 24a.)

The CBA provides that "[n]o employee shall be disciplined or discharged without just cause." (App at 25a.) The CBA also limits the Arbitrator's authority: "The arbitrator will have no power to add to, subtract from, or modify this Agreement." (*Id.*)

After a hearing, Arbitrator Scott Daniels found that the grievant had tested positive for marijuana. (*Id.* at 28a.) He also found: "The Drug and Alcohol Abuse Policy, agreed to by the Union, specifies that 'Any positive drug or alcohol test . . . is a violation of this Policy.' The policy also clearly indicates the intent of the Company to take disciplinary action for violation, includ[ing] termination."(*Id.* at 29a.)

Despite these findings, the Arbitrator went on to discuss Kennecott's "legitimate interest in preventing drug use, possession, and the influence of drugs and alcohol *on the job*" and the employees' "right to privacy while off the job."(App. at 30a [emphasis in original].) Following these reflections, the Arbitrator stated:

> I do not believe that a positive drug test is a proper ground for discipline if it does not indicate on the job use or possession of drugs or working under the influence of drugs or alcohol. . . .
>
> The testimony in the arbitration was that marijuana is active in the body for about 3 hours. It can remain active for as long as eight hours. The drug test, however, may be positive for a week to ten days. Therefore, in order to discipline, especially terminate, an employee for a positive

> result on this particular test, there must be *some* additional evidence of on the job impairment, possession or use.

(App. at 30a-31a [emphasis in original].)

The Arbitrator considered the appropriate remedy, and found that the grievant was "not entirely without fault." (*Id.* at 32a.) The grievant had lied about his marijuana use in the course of the employer's investigation. (*Id.* at 28a, 32a.) The Arbitrator therefore ordered the grievant "returned to work without loss of seniority, but without back pay." (*Id.* at 32a.)

C. The Proceedings Below.

1. *The District Court.*

Kennecott filed this action in the United States District Court for the District of Utah based on 29 U.S.C. § 185(a) and 9 U.S.C. § 1, *et seq*. The District Court decided the case on cross-motions for summary judgment. (App. at 16a.) Kennecott argued that the Award violated an explicit, well defined, and dominant public policy found both in federal precedent and in Utah state statutes supporting employers' efforts to establish drug-free workplaces. Kennecott also argued that the Arbitration Award failed to draw its essence from the MOU or the CBA.

The District Court rejected both arguments. It held that: (a) Kennecott had not established a sufficient public policy to support the Court's refusal to enforce the Award; and (b) the Award did not violate the established public policy against drug use by workers in safety-sensitive positions.

(App. at 21a-22a.) The District Court also held that the Award drew its essence from the MOU and the CBA because the Arbitrator had interpreted the MOU's authorization of discharge in light of the CBA's requirement that discipline be for "just cause" and therefore had neither exceeded his authority under the CBA, nor ignored the plain language of the MOU. (*Id.* at 20a.)

2. *The Court of Appeals.*

Kennecott appealed to the Tenth Circuit Court of Appeals on the same grounds argued before the District Court. The Circuit Court held that the Utah Code did not "constitute a clear public policy that prohibits reinstatement of an employee in the grievant's circumstances . . . ." (App. at 12a.) The Tenth Circuit also held that Kennecott's reliance on the Utah Code and on *Exxon Corp. v. Esso Workers' Union*, 118 F.3d 841, 846-48 (1st Cir. 1997), did not demonstrate the existence of a public policy supporting employers' efforts to establish drug-free workplaces. (App. at 15a.)

The Tenth Circuit held that the Award drew its essence from the CBA because the Arbitrator only interpreted the MOU in light of Kennecott's right under the CBA to discharge only for "just cause." (*Id.* at 8a.) The Court dismissed the argument that the MOU expressly provided for discipline, including discharge, stating "this is simply a matter of interpretation" and therefore within the province of the Arbitrator. (*Id.*)

REASONS FOR GRANTING THE WRIT

I.

THE OPINION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUIT COURTS ON THE EXISTENCE OF A PUBLIC POLICY VIOLATED BY THE FORCED REINSTATEMENT TO A SAFETY-SENSITIVE POSITION OF AN EMPLOYEE WHO TESTS POSITIVE FOR DRUG USE.

A. An Arbitration Award Must Be Set Aside If The Arbitrator's Interpretation Of The Collective Bargaining Agreement Is Contrary To Public Policy.

In *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 35 (1987), this Court addressed "when courts may set aside arbitration awards as contravening public policy:"

> A court's refusal to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy. . . . That doctrine derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act, and is further justified by the observation that the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary

> takes account of those interests when it considers whether to enforce such agreements.

Misco, 484 U.S. at 42 (citations omitted).

In *Misco*, the employer discharged an employee for having drugs on company premises, and an arbitrator ordered the employee reinstated. *Id.* at 33-34. The District Court set aside the award as contrary to a public policy expressed in "general safety concerns that arise from the operation of dangerous machinery by persons under the influence of drugs or alcohol." *Id.* at 34-35. The Fifth Circuit affirmed. *Id.* at 35.

Relying on *W.R. Grace and Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum and Plastic Workers*, 461 U.S. 757, 766 (1983), this Court held that:

> [A] court may not enforce a collective-bargaining agreement that is contrary to public policy, and [] that the question of public policy is ultimately one for resolution by the courts. [The *W.R. Grace* Court] cautioned, however, that a court's refusal to enforce an arbitrator's interpretation of such contracts is limited to situations where the contract as interpreted would violate some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.

Misco, 484 U.S. at 43 (internal citations and quotation marks omitted).

This Court reversed the Fifth Circuit because "the formulation of public policy set out by the Court of Appeals did not comply with the statement that such a policy must be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Id.* at 44 (internal quotation marks omitted). In the present case, unlike *Misco*, laws and legal precedents show an explicit, well defined and dominant public policy.

B. The Circuit Courts Have Divided Over The Existence Of A Public Policy Encouraging Employers To Create And To Enforce Drug-Free Workplace Policies.

The public policy at issue in the present case is accurately described by the First Circuit in *Exxon Corp. v. Esso Workers' Union, Inc.*, 118 F.3d 841, 849 (1st Cir. 1997). "[P]ublic policy dictates not only that employees refrain from performing safety-sensitive jobs while under the influence of drugs, but also that employers develop (and enforce) programs designed to discourage such activity." This is the policy embodied in the Utah Code — encouraging employers to develop drug-free workplace policies and authorizing employers to enforce such policies. The First Circuit found that this public policy was violated by forcing the employer to reinstate an employee discharged following a positive drug test. *Id.* at 850.

In *Esso Workers*, the grievant worked in the safety-sensitive position of loading, driving, and unloading a five-axle tractor trailer combination which carried 12,000 gallons of flammable motor fuel. 118 F.3d at 843. The employer had a drug and alcohol abuse policy in place, modeled on the Drug-Free Workplace Act of 1988, 41 U.S.C. §§ 701-707 (1994). *Esso Workers*, 118 F.3d at 843. The policy provided for random testing of employees in safety-sensitive positions and for termination for any positive drug test. *Id.*

In a random drug test, the grievant tested positive for cocaine. *Id.* at 844. Without any evidence that the grievant was actually impaired or under the influence of cocaine on the job, the employer discharged him. *Id.* An arbitrator ordered the grievant reinstated on the ground that discharge was too severe a punishment. *Id.*

The First Circuit set aside the arbitration award, relying on the public policy encouraging employers to develop and to enforce programs against drug use in safety-sensitive positions. The court ascertained this public policy in the manner approved in *Misco*, by examining statutes and legal precedent. *Esso Workers*, 118 F.3d at 846-49. The First Circuit relied on the Omnibus Transportation Employee Testing Act, 49 U.S.C. § 31306 (1994) and the Drug-Free Workplace Act, 41 U.S.C. §§ 701(a)(1), 702(a)(1). Both of these statutes postdate this Court's decision in *Misco*. *See Esso Workers*, 118 F.3d at 851 n.6. The court also relied on a variety of federal regulations that "mandate regular drug testing for employees in safety-sensitive positions," including regulations of the Federal Aviation Administration, the Coast Guard, the Federal Railroad Administration, and the Federal Transit Administration. *Id.* at 848. The First Circuit also relied on legal precedent from the Fifth Circuit and the Third Circuit. *Id.* at 847.

Based on this "well-defined and dominant public policy," the First Circuit held that:

> [F]orcing an employer to reinstate an employee who tests positive for drug use pursuant to a test that the employer administers as part of a drug-free workplace program would undermine that policy. It makes no sense to construe public policy

> as encouraging — and in some cases mandating — employers to establish and enforce drug-testing programs, yet to preclude them from taking decisive action against those employees who test positive.

Esso Workers, 118 F.3d at 849, 850.

Other Circuit Courts rely on similar formulations of public policy. The Third Circuit has repeatedly identified public policies that encourage drug testing and has found such policies to be violated by arbitration awards reinstating discharged employees who tested positive for drugs. *See, e.g., Exxon Shipping Co. v. Exxon Seamen's Union*, 73 F.3d 1287, 1294-95 (3d Cir. 1996) ("[a] clearly defined and cautiously administered program of drug testing . . . is the natural corollary to . . . a strong public policy that precludes allowing intoxicated or drug-impaired seamen to remain in safety-sensitive positions aboard oil tankers"); *Exxon Shipping Co. v. Exxon Seamen's Union*, 11 F.3d 1189, 1196 (3d Cir. 1993) (finding a "well defined and dominant policy that owners and operators of oil tankers should be permitted to discharge crew members who are found to be intoxicated while on duty"); *Exxon Shipping v. Exxon Seamen's Union*, 993 F.2d 357, 361 (3d Cir. 1993) (Coast Guard regulations that "require drug testing and authorize the imposition of stiff penalties on employees . . . who fail drug tests" embody the public policy in favor of "safe operation of vehicles").

The Fifth, Eighth, and Eleventh Circuits support public policies with similar effects. *Exxon Corp v. Baton Rouge Oil and Chem. Workers Union*, 77 F.3d 850, 855-56 (5th Cir. 1996) (despite employer's clear breach of collective bargaining agreement, arbitral award reinstating employee

discharged for positive random drug test set aside as violating public policy); *Gulf Coast Indus. Workers Union v. Exxon Co.*, 991 F.2d 244, 255 (5th Cir. 1993) (compelled reinstatement of grievant who tested positive for drugs is "a plain violation of public policy favoring a safe and drug-free workplace" despite lack of evidence of on-site use); *Union Pacific R.R. Co. v. United Transp. Union*, 3 F.3d 255, 261-62 (8th Cir. 1993) (where arbitration board refused to consider evidence of employee's positive drug tests, award set aside as contrary to "public policy against a railroad's employment of individuals whose impaired judgment due to the use of drugs or alcohol could seriously threaten public safety"); *Delta Airlines, Inc. v. Air Line Pilots Ass'n Int'l*, 861 F.2d 665, 674 (11th Cir. 1988) (arbitration award set aside because public policy restricted employer's freedom to arbitrate discharge of pilot who flew while drunk).

In the present case, the Tenth Circuit expressly rejected the public policy found by the First Circuit. The Tenth Circuit quoted the public policy identified by the First Circuit in *Esso Workers*: "not only that employees refrain from performing safety-sensitive jobs while under the influence of drugs, but also that employers develop (and enforce) programs designed to discourage such activity." (App. at 14a.) But the Tenth Circuit refused to apply that public policy in this case because Kennecott did not "rely upon the same provisions at issue" in *Esso Workers*. (*Id.* at 15a.) The Tenth Circuit also held that reliance on the Utah Code "is not persuasive to demonstrate the alleged public policy violation" (*id.*), despite the *Misco* court's explicit instruction to ascertain public policy "by reference to the laws and legal precedents." *Misco*, 484 U.S. at 43.

By rejecting the public policy expressed in *Esso Workers*, the Tenth Circuit has joined the Second, Sixth, and Ninth Circuit Courts in a stark split of opinion with the First, Third, Fifth, Eighth, and Eleventh Circuit Courts. As discussed above, the First, Third, Fifth, Eighth and Eleventh Circuit Courts all endorse public policies under *Misco* that prohibit the forced reinstatement of employees into safety sensitive positions following the employees' positive drug tests. The Second, Sixth, Ninth and now the Tenth Circuit Courts all hold that no public policy precludes the forced reinstatement of employees discharged for drug-related reasons. *See St. Mary Home, Inc. v. Serv. Employees Int'l Union, District 1199*, 116 F.3d 41, 46 (2d Cir. 1997) (finding no public policy violated by the reinstatement of an employee after his drug-related arrest); *Monroe Auto Equip. Co. v. Int'l Union, UAW*, 981 F.2d 261, 269 (6th Cir. 1992) (finding no violation of public policy in reinstating an employee who tested positive for drug use without evidence of impairment at work); *United Food and Commercial Workers Int'l Union, Local 588 v. Foster Poultry Farms*, 74 F.3d 169, 174 (9th Cir. 1995) (upholding reinstatement because it is not illegal to reinstate employees who test positive for drug use).

C. The Circuit Courts Have Divided Over The Relevance Of Public Policies Other Than Those Forbidding The Arbitrator's Chosen Remedy.

Underlying the division among the Circuit Courts over the public policy encouraging employers to enforce drug-free workplace policies lies a distinction between a narrow and a broad view of the public policy exception to the enforcement of arbitration awards. The Ninth Circuit, for example, espouses a "narrow view" of when a court may refuse to enforce an award on public policy grounds.

Stead Motors v. Automotive Machinists Lodge No. 1173, 886 F.2d 1200, 1212 (9th Cir. 1989). In applying public policy to an arbitration award, "[a] court must both delineate an overriding public policy rooted in something more than general considerations of supposed public interests, and, of equal significance, it must demonstrate that the policy is one that specifically militates against the relief ordered by the arbitrator." *Id.* at 1212-13 (internal quotation marks omitted). In short, "[i]f a court relies on public policy to vacate an arbitral award reinstating an employee, it must be a policy that bars reinstatement." *Id.* at 1212.

The Ninth Circuit applied this doctrine in *Stead Motors* to enforce an arbitration award reinstating a careless mechanic. The employer had discharged the mechanic after he repeatedly failed to tighten lug nuts properly on automobile wheels and the arbitrator ordered him reinstated. *Id.* at 1202-03. The Ninth Circuit enforced the arbitration award despite the employer's argument that it violated public policy, in part because no public policy made "it illegal to employ an auto mechanic who has previously committed a reckless act." *Id.* at 1216-17. *See also Int'l Bhd. of Elec. Workers, Local 97 v. Niagara Mohawk Power Corp.*, 143 F.3d 704, 717 (2d Cir. 1998) (focussing on whether remedy imposed violates public policy).

This narrow view is now endorsed by the Tenth Circuit. In stating the standard it would apply to Kennecott's public policy argument, the Tenth Circuit stated: "we ask only whether the award itself (i.e. reinstatement), and not the underlying reasons for the award, violate public policy." (App. at 9a [citing *Stead Motors* and *Niagara Mohawk*].)

The Eleventh Circuit expressed the "broad" view in *Delta Airlines*, 861 F.2d at 671-72. In *Delta Airlines*, a pilot was discharged for flying an airplane while drunk. *Id.* at 666. An arbitration panel ordered the pilot's reinstatement, despite acknowledging that he had committed a dischargeable offense. *Id.* at 668. After reviewing numerous statutes and legal precedents showing a public policy against flying an airplane while drunk, the Eleventh Circuit concluded that "Delta . . . was under a duty to prevent the wrongdoing of which its [pilot] was guilty, and it could not agree to arbitrate that issue." *Id.* at 674. Consequently,

> [t]he collective bargaining agreement between Delta and the [union], as interpreted by the [Arbitration] Board, insofar as it would submit to arbitration the question of whether Delta should authorize operation of aircraft by pilots under the influence of alcohol, violates public policy and cannot be enforced. The award of the [Arbitration] Board, which would give effect to such an interpretation, cannot be enforced.

Id.

The Eleventh Circuit's analysis of the public policy exception requires a finding, not that the *remedy* ordered by the arbitrator violated public policy, but that the *contract*, as interpreted by the arbitrator, violated public policy. *See Misco*, 484 U.S. at 43 (the public policy exception is limited to "situations where the contract as interpreted" violates public policy). Other Circuit Courts have followed the lead of the Eleventh. *See Exxon Shipping Co. v. Exxon Seamen's Union*, 11 F.3d 1189, 1192 (3d Cir. 1993) (rejecting view that arbitration award violates public policy

only when enforcement would violate positive law); *Gulf Coast*, 991 F.2d at 253-54 (rejecting narrow view).

This split among the Circuit Courts over the proper analysis of the public policy exception underlies the disagreement over the public policy violated by the forced reinstatement of an employee discharged pursuant to an employer's drug policies. On the Ninth and Second Circuits' narrow view, no such public policy exists. Public policy allows employers to employ and to reinstate employees who test positive for drugs, even after causing accidents with fully loaded dump trucks or oil tankers. On the broad view, however, public policy encourages employers to develop drug policies and authorizes them to enforce such policies. Consequently, public policy forbids the arbitrator to block the employer's efforts. *See Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357, 363 (3d Cir. 1993) (discussing distinction between broad and narrow view).

The Circuit Courts are divided over: (a) the existence of an explicit, well defined and dominant public policy encouraging employers to develop and enforce drug-free workplace policies; and (b) whether the public policy exception to the enforcement of arbitration awards, as described in *Misco*, requires a public policy that forbids the arbitrator's stated remedy or a public policy that bars the terms of the contract as interpreted by the arbitrator. These two splits among the Circuit Courts create confusion for employers nationwide.

If the grievant in this case had been employed in the First, Third, Fifth, Eighth, or Eleventh Circuits, the Arbitration Award reinstating him would have been set aside. If the grievant had been employed in the Second, Sixth, or

Ninth Circuits, the Award would have been upheld, as it was in the Tenth Circuit. This state of affairs interferes with this Court's announced policy of developing a unified federal labor law. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957). Inconsistent rules frustrate Congress' effort "to stimulate the smooth functioning of [the collective bargaining] process" and "strike[] at the very core of federal labor policy." *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962).

II.

THE OPINION BELOW CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT IN HOLDING THAT THE ARBITRATION AWARD DREW ITS ESSENCE FROM THE COLLECTIVE BARGAINING AGREEMENT.

Under this Court's decisions, collective bargaining agreements play the central and most important role in federal labor policy. *See, e.g., United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). The agreement "states the rights and duties of the parties." *Id.*

Within the framework of the parties' agreement, the arbitrator has a limited role:

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. . . . Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense

> his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

Courts also have a limited role in enforcing collective bargaining agreements and arbitration decisions. Their role is to guarantee that the arbitrator stays within his authority. "When the arbitrator's words manifest an infidelity to this obligation [to interpret and apply the collective bargaining agreement], *courts have no choice* but to refuse enforcement of the award." *Id.* (emphasis added).

The Tenth Circuit has deviated from this Court's instruction to hold arbitrators to their obligation. Here, the Arbitrator failed to meet his obligation to interpret the CBA and MOU. He ignored the MOU's plain language providing for discipline or discharge of employees who test positive for drugs. He exceeded his authority by adding a requirement of on-the-job impairment, possession or use. Finally, he explicitly imposed his own beliefs about the proper use of drug testing. Nevertheless, the Tenth Circuit chose to uphold the Award.

A. The Arbitration Award Conflicts With The Plain Meaning Of The MOU.

Kennecott and the Union agreed to the terms of the MOU. The MOU prohibits "[w]orking . . . while not being free from the presence of drugs." (App. at 25a.) Compliance

with the MOU is "a condition of employment." (*Id.* at 26a.) The Arbitrator noted these terms, and also found that the MOU "clearly indicates the intent of the Company to take disciplinary action for violation, includes [sic] termination." (*Id.* at 29a.) The Arbitrator also found that the grievant had tested positive for marijuana (*id.* at 28a), thus violating the MOU.

The Award contains not one further word about the bargained-for language of the MOU or the CBA. The Arbitrator went on to state that there are different types of drug tests (App. at 29a), but related none of the different tests to the MOU or to the standards for a "positive" test set out in the MOU. (*Id.* at 36a.) The Arbitrator speculated on the Company's "legitimate interest in preventing drug use" and the employee's "right to privacy" *(id.* at 30a), and went on to describe his own beliefs about when a positive drug test is a "proper ground for discipline." (*Id.*) Following these irrelevant remarks, the Arbitrator *concluded* that "in order to discipline, especially terminate an employee for a positive result on this particular test, there must be *some* additional evidence of on the job impairment, possession or use." (*Id.* at 31a [emphasis in original].)

The Arbitrator thus ignored the language of the MOU. He found that the MOU provided for discharge of any employee who violated the policy. He found a violation of the policy. But he refused to apply the language to the violation. The Award should have been set aside on these grounds. *See, e.g., Bruce Hardwood Floors v. UBC, Southern Council of Indus. Workers, Local Union No. 2713*, 103 F.3d 449, 452 (5th Cir. 1997) (where agreement calls for discharge, arbitrator may not refuse to apply the provision).

Despite the Arbitrator's dereliction of his obligation to interpret and apply the CBA and MOU, the Tenth Circuit enforced the Award. The Circuit Court held that the Arbitrator was interpreting the MOU in light of the "just cause" language of the CBA. (App. 8a.) The Tenth Circuit purportedly reached this conclusion from the fact that the "specific award in this case was reinstatement," and that, in stating the remedy, the Arbitrator wrote, "the Grievant was terminated without just cause." (*See id.* at 7a.)

The Tenth Circuit should not have relied on the Arbitrator's casual characterization of his decision. *See, e.g., Coca-Cola Bottling Co. v. Teamsters Local Union No. 688*, 959 F.2d 1438, 1442 (8th Cir. 1992) (arbitrator lacked authority to interpret unambiguous language of agreement contrary to its plain meaning while characterizing his actions as fact-finding); *In re Marine Pollution Serv., Inc.*, 857 F.2d 91, 94 (2d Cir. 1988) (arbitrator may not shield his "outlandish disposition" by making "noises of contract interpretation" [internal quotation marks omitted]). Though the Arbitrator used the phrase "just cause," it played no role in his decision.

The Circuit Court also held that the Arbitrator had the authority to interpret "just cause" in this case because "[n]owhere in the CBA or the [MOU] was just cause defined and nowhere did the parties specify that mere presence of drugs constituted just cause for termination." (App. at 7a.) This argument ignores the plain meaning of the MOU. The Arbitrator recognized that the MOU provides for the discharge of employees who violate the drug policy. The Arbitrator also found that the grievant tested positive, violating the policy. Once the Arbitrator interpreted the MOU and found the violation, no further issue of "just cause"

existed. The MOU conclusively *defined* "just cause" in the context of a drug test. *See Mountaineer Gas Co. v. Oil, Chemical & Atomic Workers Int'l. Union*, 76 F.3d 606, 610 (4th Cir. 1996) (arbitration award set aside because "the words 'proper cause' of the CBA cannot be the loophole through which the arbitrator bypasses the Drug Policy's mandatory language to implement his own brand of industrial justice."); *Bruce Hardwood*, 103 F.3d at 452 n.5 (overturning award where arbitrator held employee's lying did not justify immediate discharge despite contract language authorizing immediate discharge for "immoral conduct").

By holding that this Arbitrator "interpreted" the agreement between the parties, the Tenth Circuit permitted the Arbitrator to neglect his obligations to the contracting parties. In so doing, the Circuit Court failed to follow this Court's instruction in *Enterprise Wheel*, 363 U.S. at 597.

B. The Arbitrator Exceeded His Authority By Adding Terms To The MOU.

Under the terms of the CBA, "the arbitrator will have no power to add to, subtract from, or modify this Agreement." (App. at 25a.) Despite his finding that "[a]ny positive drug or alcohol test . . . is a violation" of the MOU and that the MOU provides for discipline, including discharge, for any violation (*id.* at 29a), the Arbitrator concluded that "in order to discipline, especially terminate, an employee for a positive result on this particular test, there must be some *additional evidence of on the job impairment, possession or use.*" (*Id.* at 31a [emphasis replaced].) Thus the Arbitrator added a requirement of on-the-job impairment, possession or use as a prerequisite to any discipline under the MOU, and thereby exceeded the scope of his authority under the CBA.

See, e.g., Alvey, Inc. v. Teamsters Local Union No. 688, 132 F.3d 1209, 1213 (8th Cir. 1997) (award set aside where arbitrator "effectively wrote a relevant work rule out of the agreement by looking exclusively at an inconclusive outside source").

The Tenth Circuit concluded that the Arbitrator was in fact interpreting the "just cause" language of the CBA, and that adding an additional prerequisite to discipline was permissible under that language. (App. at 8a.) In support, the Circuit Court cited *Esso Workers*, 118 F.3d at 845-46. In *Esso Workers*, before turning to the public policy arguments discussed in Part I, *supra*, the First Circuit upheld the arbitration award against a charge similar to the one Kennecott makes here. *Id.* In that case, the arbitrator explicitly interpreted the language "may discharge or otherwise discipline" to mean that any change in grade from the least burdensome form of discipline to discharge was subject to the arbitrator's own review for "just cause." *Id.* at 845. The Tenth Circuit erroneously applied the same reasoning to the present case, without noticing that the Arbitrator here rejected the very basis for that reasoning. According to this Award, Kennecott may not even *discipline* employees based on a positive drug test without a showing of on-the-job impairment, possession or use. (App. at 31a.) Unlike *Esso Workers*, here there is no issue of choosing between discharge and suspension. The Arbitrator simply rejected the express agreement between Kennecott and the Union to discipline employees who test positive for drugs.

Because the Arbitrator added a requirement of on-the-job impairment, possession or use to the MOU, he exceeded his authority under the CBA and the Award should have been set aside. *See Int'l Bhd. of Elec. Workers, Local 175 v.*

Thomas & Betts Corp., 182 F.3d 469, 472 (6th Cir. 1999) (arbitrator's description of his award as interpolating terms showed he added additional terms to agreement); *Beacon Journal Publishing Co. v. Akron Newspaper Guild, Local No. 7*, 114 F.3d 596, 600 (6th Cir. 1997) (award set aside where arbitrator imposed own system for scheduling vacation despite employer's exclusive right under agreement to schedule vacation). By upholding the Award, the Tenth Circuit ignored this Court's instruction to hold arbitrators to their obligation to interpret and apply the parties' agreements.

C. The Arbitrator Administered His Own Brand Of Industrial Justice.

Labor arbitrators "do[] not sit to dispense [their] own brand of industrial justice." *Enterprise Wheel*, 363 U.S. at 597. In refusing to support the grievant's discharge under the MOU, the Arbitrator stated: "I do not believe that a positive drug test is a proper ground for discipline if it does not indicate on the job use or possession of drugs or working under the influence of drugs or alcohol." (App. at 30a.)

The Arbitrator's words demonstrate that he did not attempt to fashion his opinion from the language agreed between Kennecott and the Union. Rather, he applied his own general beliefs about drug testing, and disregarded the clear language of the MOU. The Arbitrator thereby unilaterally nullified the agreement that the employer may discipline any employee who returns a "positive" drug test as defined in the MOU. The Award should have been set aside for this reason. *See Beacon Journal*, 114 F.3d at 600 (award set aside where arbitrator imposed his own brand of industrial justice by "crafting better solution" than that provided by the agreement itself); *Excel Corp. v. United Food*

and Commercial Workers Int'l Union, Local 431, 102 F.3d 1464, 1469 (8th Cir. 1996) ("By ignoring the plain language of several provisions in the CBA, the arbitrator created an ambiguity where none existed and proceeded to dispense his own brand of industrial justice." [internal quotation marks omitted]); *Harry Hoffman Printing, Inc. v. Graphic Communications Int'l Union, Local 261*, 950 F.2d 95, 99 (2d Cir. 1991) (award set aside where panel relied on unauthorized considerations of due process).

The Tenth Circuit dismissed the Arbitrator's use of language as a "mere ambiguity in the opinion accompanying [the] award, which permits the inference that the arbitrator may have exceeded his authority." (App. at 7a [internal quotation marks omitted].) Contrary to the Circuit Court's holding, the Arbitrator's statements of his own beliefs are the only premises from which he drew the conclusion that "there must be *some* additional evidence of on the job impairment, possession or use" before Kennecott can discipline an employee under the MOU. (App. at 31a [emphasis in original].) By refusing to accept the Arbitrator's own words as demonstrating his reasoning, the Circuit Court ignored this Court's instruction: "When the *arbitrator's words manifest an infidelity* to [the obligation to interpret and apply the collective bargaining agreement], courts *have no choice* but to refuse enforcement of the award." *Enterprise Wheel*, 363 U.S. at 596-97 (emphasis added).

Because the arbitrator: (a) ignored the acknowledged meaning of the MOU and its implications for the grievant; (b) introduced his own requirement of on-the-job impairment, possession or use; and (c) explicitly relied on his own notions of a "proper" drug testing policy, the Award does not draw its essence from the MOU or the CBA. Therefore, the Tenth

Circuit should have set aside the Award. Instead, the Tenth Circuit ignored the Arbitrator's own language to hold that the Arbitrator interpreted the MOU and CBA. By sanctioning this Award as an interpretation of the MOU and CBA, the Circuit Court granted arbitrators in its circuit unfettered power to rewrite agreements between employers and unions. This result ignores the limited role of arbitrators in federal labor policy, and disregards this Court's instructions to monitor arbitrators' performance. *See Georgia-Pacific Corp. v. Local 27, United Paperworkers Int'l Union*, 864 F.2d 940, 946 (1st Cir. 1988) ("To allow the arbitrator to ignore the explicit language of [the agreement] by substituting his own brand of industrial justice for that agreed to by the parties would . . . promote industrial anarchy by encouraging the exercise of ad hoc arbitral revision of collective bargaining agreements." [internal quotation marks omitted]).

CONCLUSION

By rejecting the public policy advanced by the First Circuit in *Esso Workers*, the Tenth Circuit joined in a split of opinion among the Circuit Courts both over the existence of a public policy encouraging employers to enforce drug-free workplace policies and over when public policy conflicts with an arbitration award. In addition, the Tenth Circuit's decision defies the rulings of this Court concerning the limited power of arbitrators and the role of the courts in enforcing agreements between employers and unions.

Accordingly, Kennecott respectfully requests that its petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND FILED OCTOBER 29, 1999

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 98-4081

KENNECOTT UTAH COPPER CORPORATION,

Plaintiff-Counter-Defendant-
Appellant,

vs.

GEORGE BECKER; WAYNE HOLLAND, JR.; TOM PERFILI; SUBDISTRICT 5 UNITED STEEL WORKERS OF AMERICA; LOCAL 392 UNITED STEELWORKERS OF AMERICA,

Defendants-Appellees,

and

UNITED STEEL WORKERS OF AMERICA, AFL-CIO,

Defendant-Counter-Claimant-
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
(D.C. No. 97-CV-640-K)

* * *

Appendix A

Before **TACHA**, and **KELLY**, Circuit Judges and **WEST**,* District Judge.

KELLY, Circuit Judge.

This action involves an employer challenge to the validity of an arbitration award requiring the employer to reinstate an employee who, after an accident, tested positive for marijuana. The union counterclaimed seeking enforcement of the award. The district court granted summary judgment in favor of the union and the employer appeals. Federal jurisdiction exists under § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185(a) and 28 U.S.C. § 1291. We affirm.

Background

Kennecott Utah Copper Corporation ("Kennecott") entered into a collective bargaining agreement ("CBA") with the United Steelworkers of America, AFL-CIO and their affiliated districts (collectively "Union"). The CBA came into effect on October 6, 1993 and was to remain in force until September 30, 1996. In relevant part, the CBA stated: "No employee shall be disciplined or discharged without just cause." CBA Article 5.1 *Discipline*, 1 Aplt. App. at 32. "Just cause" is nowhere defined in the CBA.

In 1994, Kennecott and the Union joined in a Memorandum of Agreement which detailed the company's

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* The Honorable Lee R. West, Senior District Judge, United States District Court of the Western District of Oklahoma, sitting by designation.

new "Drug and Alcohol Abuse Policy" ("Policy"). The Policy proscribed the use of drugs in the workplace and permitted Kennecott to test employees for drug use under certain conditions. Included among these was a provision permitting testing "[w]hen an employee may have contributed to an accident involving a fatality, bodily injury, or damage to property." Drug and Alcohol Abuse Policy, *Testing*, B(2), Aplt. App. at 81. The Policy also contained a section entitled *Implementation and Compliance* which stated:

> Compliance with this Policy is a condition of employment. The Company intends to take disciplinary action, up to and including termination, against any employee who violates this Policy.

Policy, *Implementation and Compliance* B, Aplt. App. at 83.

On July 26, 1996, a truck driver ("grievant"), who was a member of the Union, was involved in a roll-over accident with a fully loaded ten-wheel dump truck at the Kennecott Bingham Canyon Mine. After conducting an investigation, Kennecott determined that the accident was primarily caused by the failure of a tie-rod on the truck which made the steering inoperable. However, the investigators also found that the grievant may have contributed to the accident by failing to brake in a timely manner.

Kennecott ordered the grievant to submit to a drug test which was positive for cannabinoids. The grievant requested an evaluation from an independent lab with the same result. At a July 31, 1996 hearing, the grievant maintained that he

had not used marijuana for five or six weeks. Subsequently, he was terminated. The Union filed a grievance and the matter was submitted to arbitration as required under the CBA.

At the arbitration, the grievant admitted that he had used marijuana two days before the accident and that his former statement regarding drug use was a lie. The arbitrator found that Kennecott was justified under the CBA in requiring the grievant to submit to the drug test. He also found that Kennecott had a legitimate interest in preventing drug use and the influence of drugs on the job. This interest, however, when read in light of the "just cause" clause, required more than a showing of the mere presence of drugs. "[I]n order to discipline, especially terminate, an employee for a positive result on this particular test, there must be *some* additional evidence of on the job impairment, possession or use." Aplt. App. at 5. There was no evidence that the presence of cannabinoids in the grievant's system had any effect upon or relationship to the roll-over accident. Therefore, the arbitrator found that "[t]he *sole* reason [for dismissal] was the positive drug test, and this, standing entirely alone, is not enough to create just cause to terminate." *Id.* The arbitrator ordered reinstatement but denied back pay because of the grievant's dishonesty.

Kennecott sought to overturn the award in district court, claiming that the arbitrator exceeded his authority in interpreting the CBA and that reinstatement of the Grievant would violate public policy. The Union cross-claimed for enforcement. On cross motions for summary judgment, the district court held in favor of the Union and Kennecott appeals.

Appendix A

Discussion

The applicable standard of review was recently discussed in *Kennecott Utah Copper Corp. v. Becker*, No. 98-4045, 1999 WL 58670 (10th Cir. Aug. 5, 1999).

> This court reviews a summary judgment in a labor-arbitration case de novo. Judicial review of labor-arbitration awards, however, "is among the narrowest known to the law." *Champion Boxed Beef v. Local No. 7*, 24 F.3d 86, 87 (10th Cir.1994). "The arbitrator's factual findings are beyond review, and, so long as the arbitrator does not ignore the plain language of the [CBA], so is his interpretation of the contract." *Id.* "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987).

Id. at *5. So long as the award "draws its essence from the collective bargaining agreement," the court must uphold the arbitrator's decision. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

A. Arbitration Award

Kennecott argues that the arbitrator failed to follow the plain language of the CBA and the Policy. An arbitration

award will not be upheld if it is contrary to the express language of the contract. *Misco*, 484 U.S. at 38; *see also Mistletoe Express Service v. Motor Expressmen's Union*, 566 F.2d 692, 694 (10th Cir. 1977). Kennecott argues that the arbitrator inserted a new requirement of job impairment into the contract, and points to the following language in the arbitration opinion:

> I do not believe that a positive drug test is a proper ground for discipline if it does not indicate on the job use or possession of drugs or working under the influence of drugs or alcohol. . . .
>
> . . . .
>
> [I]n order to discipline, especially terminate, an employee for a positive result on this particular test, there must be *some* additional evidence of on the job impairment, possession or use.

Aplt. Br. at 9 (quoting Alt. App. at 4, 6). In particular, Kennecott argues that the use of words like "believe" prove that the arbitrator was dispensing his own brand of justice rather than strictly interpreting the contract.

Kennecott's argument is unavailing given the applicable standard of review. In determining whether or not the arbitration award "draws its essence" from the CBA, a reviewing court looks to the award itself and not at every phrase contained in the arbitrator's opinion.

Appendix A

> A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable for a well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement.

Enterprise Wheel, 363 U.S. at 598 (footnote omitted); *see also Tennessee Valley Authority v. Tennessee Valley Trades & Labor Council*, 184 F.3d 510, 514 (6th Cir. 1999) (upholding arbitration reinstatement award in which arbitrator used "I believe" language); *Arch of Illinois v. District 12, United Mine Workers*, 85 F.3d 1289, 1293 (7th Cir. 1996) ("[Before we reject an award because of language in the arbitrator's opinion, the opinion must unambiguously reflect that the arbitrator based his decision on noncontractual grounds."). We analyze the language of the opinion as it relates to the final award.

The specific award in this case was reinstatement. The arbitrator held: "As Grievant was terminated without just cause, he should be returned to work without loss of seniority." Aplt. App. at 5. Nowhere in the CBA or Policy was just cause defined and nowhere did the parties specify that mere presence of drugs constituted just cause for termination. *Cf. Mistletoe*, 566 F.2d at 694 (addressing a

collective bargaining agreement which specifically listed actions which constituted just cause for discharge). Kennecott, however, argues that the language of the Policy ("intends to take disciplinary action, up to and including termination" and "[c]ompliance with this Policy is a condition of employment") is simply another way of stating that any drug use or presence is equivalent to just cause. This is simply a matter of interpretation. It is the province of the arbitrator to interpret contractual provisions and a reviewing court may not substitute its interpretation for that of the arbitrator. *Litvak Packing Co. v. United Food & Commercial Workers*, 886 F.2d 275, 276 (10th Cir. 1989); *see also First National Supermarkets v. Retail Employees Local 338*, 118 F.3d 892, 896 (2d Cir. 1997) (noting that it is arbitrator's responsibility to interpret just cause when CBA does not otherwise define the term).

The arbitrator's decision makes it clear that he was interpreting the Policy in light of the employer's right to discharge only for just cause, and we cannot review the merits. *See Monroe Auto Equipment Co. v. International Union*, 981 F.2d 261, 268 (6th Cir. 1992). The interpretation of just cause to require a prerequisite, such as on-the-job impairment, before termination is allowed draws its essence from the CBA and must be upheld. *See Exxon Corp. v. Esso Worker's Union, Inc.*, 118 F.3d 841, 845-46 (1st Cir. 1997) (upholding similar interpretation of just cause language, although reversing arbitration award on public policy grounds).

Appendix A

B. Public Policy

Kennecott also argues that the arbitration award should not be enforced because it violates public policy. "[I]n determining whether an arbitration award violates public policy, a court must assess whether 'the specific terms contained in [the contract] violate public policy,' by creating an 'explicit conflict with other 'laws and legal precedents.' ' " *Seymour v. Blue Cross/Blue Shield*, 988 F.2d 1020, 1024 (10th Cir. 1993) (citations omitted). The policy involved must be an "explicit public policy" that is "well defined and dominant, and is . . . ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.' " *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983) (citation omitted). In applying this limited exception, we ask only whether the award itself (i.e. reinstatement), and not the underlying reasons for the award, violate public policy. *See International Brotherhood of Electrical Workers v. Niagara Mohawk Power Corp.*, 143 F.3d 704, 716 (2d Cir. 1998); *Stead Motors v. Automotive Machinists Lodge*, 886 F.2d 1200, 1212 (9th Cir. 1989) ("If a court relies on public policy to vacate an arbitral award reinstating an employee, it must be a policy that bars reinstatement.").

Several courts have held that a clear public policy exists against performing safety sensitive jobs while impaired by drugs or alcohol. *See, e.g., Exxon Corp. v. Esso Workers' Union*, 118 F.3d 841, 846-48 (1st Cir. 1997) (gasoline tanker driver); *Exxon Corp. v. Baton Rouge Oil & Chemical Workers Union*, 77 F.3d 850 (5th Cir. 1996) (chemical plant operations controller); *Exxon Shipping Co. v. Exxon*

Seamen's Union, 11 F.3d 1189, 1191-96 (3d Cir. 1993) (oil tanker seaman); *Union Pacific R.R. Co. v. United Transp. Union*, 3 F.3d 255, 258-63 (8th Cir. 1993) (railroad brakeman); *Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357, 360-64 (3d Cir. 1993) (oil tanker helmsman); *Gulf Coast Indus. Workers Union v. Exxon Co.*, 991 F.2d 244, 248-53 (5th Cir. 1993) (chemical refinery technician); *Delta Air Lines, Inc. v. Air Line Pilots Ass'n Int'l*, 861 F.2d 665, 671-74 (11th Cir. 1988) (airline pilot); *Iowa Elec. Light & Power Co. v. Local Union 204, Int'l Bhd. of Elec. Workers*, 834 F.2d 1424 (8th Cir. 1987) (nuclear power plant machinist). These cases are distinguishable. In the present case, there was no finding that grievant ever used drugs at work or was impaired while operating in a safety sensitive position. The difficult issue in this case is whether reinstatement of the grievant would actually violate public policy, given a single positive test, no evidence of impairment, and no evidence of workplace possession or use.

Kennecott argues that the arbitrator's award violates the public policy embodied in the Utah Drug and Alcohol Testing statutes, Utah Code. Ann. § 34-38-1 to 34-38-14 (Michie 1997). The legislative findings indicate "that a healthy and productive work force, safe working conditions free from the effects of drugs and alcohol . . . are important to employers, employees and the general public." *Id.* § 34-38-1. The enactment provides that drug testing of employees for the presence of drug or alcohol is not unlawful; however, employers and management must also submit to the testing on a periodic basis. *See id.* § 34-38-3. To test reliably for the presence of drugs or alcohol, an employer may require samples from employees. *See id.* § 34-38-4. The testing "shall

be carried out within the terms of a written policy which has been distributed to employees" and the written policy may require testing for the purposes other than possible individual impairment including accident investigation and the safety of the employees or general public. *Id.* § 34-38-7(1) & (2). Positive test results may be used for a broad range of disciplinary or rehabilitative actions, including termination.**

** The statute provides in pertinent part:

> Upon receipt of a verified or conformed positive drug or alcohol testresult which indicates a violation of the employer's written policy, . . . an employer may use that test result . . . as the basis for disciplinary or rehabilitative actions, which may include the following:
>
> (1) a requirement that the employee enroll in an employer-approved rehabilitation, treatment or counseling program, which may include additional drug or alcohol testing, as a condition of continued employment;
>
> (2) suspension of the employee with or without pay for a period of time;
>
> (3) termination of employment
>
> . . .
>
> (5) other disciplinary measures in conformance with the employer's usual procedures, including any collective bargaining agreement.

Utah Code Ann. § 34-38-8.

See id. §§ 34-38-8; 34-38-13(3). Unless the employer relies upon a false test result, an employee will not have a cause of action against the employer for establishing a drug testing program under the statute and taking the specified disciplinary or rehabilitative actions. *See id.* §§ 34-38-1; 34-38-10. The thrust of these provisions is to balance the interests of employers, employees and the general public by encouraging "fair and equitable" testing for drugs and alcohol. *Id.* § 34-38-1.

We are not persuaded that these provisions constitute a clear public policy that prohibits reinstatement of an employee in the grievant's circumstances for several reasons. First, while a general policy exists against performing safety sensitive jobs while impaired by drugs or alcohol, a general policy is not enough-there must be a showing of a specific public policy that would be violated by this award. *See Misco*, 484 U.S. at 44. The Utah provisions relied upon by Kennecott simply do not suggest that every employee in a safety sensitive position that tests positive one time, with no other evidence of drug involvement, must be fired. *Accord Niagara Mohawk*, 143 F.3d at 718 (finding that even detailed statutes regulating nuclear facilities "do not proscribe the reinstatement of employees . . . who have tested positive for drugs or alcohol."); *United Food & Commercial Workers Union v. Foster Poultry Farms*, 74 F.3d 169, 174 (9th Cir. 1995) (noting that regulation prohibiting drug use by commercial drivers is not equivalent to a policy never to employ drivers who once test positive for drug use); *Interstate Brands Corp. v. Chauffeurs, Teamsters, Warehousemen & Helpers Local Union*, 909 F.2d 885, 893 (6th Cir. 1990) ("While it is indisputable that allowing

intoxicated persons to drive motor vehicles violates public policy, it does not follow, however, that any arbitration award reinstating an employee discharged for being intoxicated while off-duty, or arrested for off-duty possession of controlled substances may never be enforced without violating the public policy exception of arbitration awards.").

While Utah Code Ann. § 34-38-8 does permit an employer to terminate an employee for failing a drug test, it is permissive and not mandatory, and termination is only one of several discretionary and non-exclusive remedies. The presence of alternative remedies strongly suggests rejection of a "one size fits all" approach to the problem; rather, facts and circumstances of the employee's situation and the positive test matter. Moreover, Utah Code Ann. § 34-38-8(5) envisions other disciplinary measures in conformity with a collective bargaining agreement. *See Delta Air Lines*, 861 F.2d at 670 (noting that even though a public policy might condemn behavior such as trafficking in drugs, an employer can still agree to arbitrate whether an employee can continue to work despite drug trafficking off the job).

Second, some deference to the arbitral process must inform our judgment whenever it is suggested that public policy prohibits enforcement of the award that is the product of the parties' agreement. Kennecott and the Union agreed to arbitrate disciplinary actions for just cause in the CBA. We must be cautious of displacing the written agreement based upon general public policy concerns because "parties to a collective-bargaining agreement must have reasonable assurance that their contract will be honored." *W.R. Grace & Co.*, 461 U.S. at 771. "When an arbitrator is commissioned

to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear and reach a fair solution of a problem. This is especially true when it comes to formulating remedies." *Enterprise Wheel*, 363 U.S. at 597. A court may not substitute its judgment for that of the arbitrator. Nor may a court decide facts to support its public policy views.

Finally, determining public policy is a uniquely legislative endeavor, one not well suited to judicial resolution, particularly given a complex social problem. We must be cautious of substituting our preferences in lieu of the contractual commitments of the parties under the guise of enforcement of public policy.

Kennecott urges us to follow the holding of the First Circuit in *Exxon Corp. v. Esso Workers' Union, Inc.*, 118 F.3d 841 (1st Cir. 1997). In that case, the union driver of a gasoline tanker tested positive for cocaine, although no showing was made that he was under the influence at any time during driving. The arbitrator, dealing with a CBA very similar to the one in the present case, held that termination was not permissible as a matter of just cause without a further showing of work related impairment. *See id.* at 845.

The First Circuit upheld the arbitrator's interpretation of the CBA but reversed the award as violative of public policy. The court determined that public policy "dictates not only that employees refrain from performing safety-sensitive jobs while under the influence of drugs, but also that employers develop (and enforce) programs designed to discourage such activity." *Id.* at 849. Based upon that

expanded policy, the court held "that forcing an employer to reinstate an employee who tests positive for drug use pursuant to a test that the employer administers as part of a drug-free workplace would undermine that policy." *Id.* at 850.

It is easy to be sympathetic to the expanded policy, and few would quarrel with the fact that an employer is not required "to await the occurrence of an incident before discharging an employee who tests positive for drug use." *Id.* at 849. However, we question whether a federal court's finding of a violation of this policy in every positive drug test case, without regard to the specific facts (such as drug use in the workplace and non-workplace, amenability to discipline, and effect on the employer's deterrent program) can be squared with the Supreme Court's admonition that case-specific facts matter and it is the province of the arbitrator, and not the courts, to find such facts. *See Misco*, 484 U.S. at 44-45 (court exceeded its authority by engaging "in factfinding about [employee's] use of drugs and his amenability to discipline"). "A refusal to enforce an award must rest on more than mere speculation or assumption." *Id.* at 44.

In any event, Kennecott does not rely upon the same provisions at issue in *Exxon Corp. v. Esso Workers' Union, Inc.*, 118 F.3d at 847-48, and its reliance upon the various sections of Utah law discussed above is not persuasive to demonstrate the alleged public policy violation.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION DATED AND FILED MAY 11, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case No. 2:97 CV 640 K

KENNECOTT UTAH COPPER CORPORATION,

Plaintiff,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO, et al.,

Defendants.

ORDER

Plaintiff Kennecott Utah Copper Corporation ("Kennecott") brings suit to vacate an award issued by Arbitrator Scott Daniels on August 6, 1997 (the "Award"). The Award interprets and applies a Collective Bargaining Agreement ("CBA") and a Memorandum of Agreement ("MOA") that supplements the CBA by adopting and setting forth Kennecott's policy regarding the use of drugs and alcohol (the "Policy"). United Steelworkers of America, AFL-CIO, two union subunits, and various union representatives are named as defendants (collectively, the "Union"). The Union countersues to enforce the award. Both sides now move for summary judgment.

Appendix B

BACKGROUND

This dispute arises in the aftermath of an accident in which a Kennecott employee (the "Employee") lost control of a loaded, ten-wheel dump truck that went off a road, through an earthen berm, and rolled over. The accident occurred on Kennecott's premises, but near a public road. The Employee's supervisors concluded that the most likely cause of the accident was an equipment failure rendering the steering inoperable, but that the Employee could have applied the brakes earlier and stopped the vehicle prior to the rollover.

Pursuant to the Policy, the Employee was tested for drugs. The results were positive and confirmed the presence of cannabinoids at a level above the maximum allowed under the Policy. Pursuant to the CBA, a hearing was held to determine what disciplinary action was appropriate. At the hearing, the Employee stated that the Employee had taken a couple of puffs of marijuana five to six weeks earlier — an account that was inconsistent with the test results. The Employee later admitted that the Employee had smoked marijuana two days prior to the accident. Because the test results exceeded the allowable limit set forth in the Policy,[1] Kennecott terminated the Employee.

Again pursuant to the CBA, the termination was grieved and proceeded to arbitration, where Arbitrator Daniels concluded that Kennecott did not have just cause to terminate

1. It is unclear whether the misrepresentation the Employee made concerning the Employee's drug use was also a factor in Kennecott's decision to terminate.

and reinstated the Employee to the Employee's former position, but did not award back pay because the Employee initially misrepresented facts concerning the Employee's drug use.

Arbitrator Daniels interpreted the CBA and the MOA to require Kennecott to produce some evidence of on-the-job impairment as a prerequisite to imposing discipline "for a positive test result on this particular test." The particular test in reference detects the presence of marijuana for a week to ten days after consumption. The testimony in arbitration was that marijuana is active in the body for between three and eight hours.

The CBA provides that no employee will be terminated without "just cause," but the term is not defined. In relevant part, the Policy provides: (i) that "[w]orking while under the influence of drugs or alcohol or while not being free from the presence of drugs" is a violation of the Policy, (ii) that any positive drug test is a violation of the Policy, (iii) that compliance with the Policy is a condition of employment, and (iv) that the company "intends to take disciplinary action, up to and including termination, against any employee who violates this Policy."

STANDARD OF REVIEW

The judicial review of an arbitration award is "among the narrowest known to the law." *Litvak Packing Co. v. U.F.C.W., Local Union No. 7, 886 F.2d 275, 276 (10th Cir. 1989)*. The Supreme Court has held that a court must enforce an arbitrator's award as long as the award draws its essence

from the collective bargaining agreement, regardless of the court's agreement or disagreement with the arbitrator's interpretation or conclusion. *United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597, 80 S.Ct. 1358, 1361 (1960).*

The parties "have agreed to be bound by the arbitrator's factfinding and contract interpretation whether his findings and conclusions are correct or not." *United Paperworkers Int'l Union v. Misco, 484 U.S. 29, 108 S.Ct. 364 (1987).* As long as the arbitrator is "even arguably construing or applying the contract," the fact that a court is convinced the arbitrator "committed serious error does not suffice to overturn his decision." *Misco, 484 U.S. at 38, 108 S.Ct. at 371 (emphasis added).*

DISCUSSION

Courts will set aside an arbitral award as failing to draw its essence from the collective bargaining agreement in two circumstances that Kennecott argues are present here. The first occurs when an "arbitrator ignores the plain language of the contract." *Misco, 484 U.S. at 38, 108 S.Ct. at 371.* Any question regarding the interpretation of ambiguous or conflicting provisions, however, is exclusively within the arbitrator's domain.

Kennecott argues that it had a right to terminate the Employee upon confirmation of a positive test result pursuant to the plain language of the Policy and that the effect of the Award is to impose an additional prerequisite to termination, namely, some evidence of on-the-job impairment. Arbitrator

Daniels did not interpret the Policy to abrogate the requirement in the CBA that all discipline be for just cause, nor does the Policy contain any provision stating that a violation of the Policy either automatically constitutes just cause or obviates the contractual requirement of just cause.

Another court has considered the effect of language that is very similar to the language in the Policy concerning Kennecott's intention to "to take disciplinary action, up to and including termination" for violation of a drug policy. The Court of Appeals for the First Circuit enforced an award in which language permitting an employer to "discharge or otherwise discipline" an employee for the commission of a listed offense was interpreted by an arbitrator as furnishing an employer "with a range of disciplinary options" that were "in turn subject to an independent application of the just cause barometer." *Exxon Corp. v. ESSO Workers' Union, Inc., 118 F.3d 841, 845 (1st Cir. 1997).*

In doing so, the First Circuit explained, "judges have no roving writ to construe the contract language in the way they think best. Rather, a court's proper province is to determine whether the arbitrator's reading is plausible, albeit not the reading the court might choose." *Id.* Given the persuasiveness of the First Circuit's opinion and the concern expressed by Kennecott in the Policy about the "effects of alcohol and drugs," this Court cannot conclude that Arbitrator Daniels ignored the plain language of the contract or otherwise exceeded the scope of his authority.

A court will also set aside an arbitral award when the contract as interpreted in the award contravenes a public

policy. Specifically, the contract as interpreted must violate "some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Misco, 484 U.S. at 43, 108 S.Ct. at 373 (internal quotation marks and citation omitted).* Assuming such a policy can be demonstrated, that enforcement of the award would constitute a clear violation of the policy must also be shown. *Misco, 484 U.S. at 43-44, 108 S.Ct. at 374.* The question of what public policy demands is within the judicial domain.

The public policy formulated by Kennecott is not sufficient to support this court's refusal to enforce the award. Kennecott asserts the existence of a public policy against the employment of a person who has tested positive for drugs. To establish the existence of such a policy, Kennecott relies primarily on Utah's drug and alcohol testing statute. *Utah Code Ann. §§34-38-1 to 34-38-15.*

The statute is structured to shield from liability an employer who conducts drug testing in accordance with a written policy and in accordance with the procedures outlined in the statute. *See § 34-38-3 (it "is not unlawful for an employer to test employees or prospective employees for the presence of drugs or alcohol").* The statute permits employers to use test results as "the basis for disciplinary or rehabilitative actions" and sets forth a noninclusive list of the actions an employer may take, which include requiring the employee to enroll in a drug treatment program, suspending the employee without pay, and "other disciplinary measures in conformance with the employer's

usual procedures, including any collective bargaining agreement." *Id.*

Because the statute authorizes an employer to respond to a positive drug test by taking actions less severe than termination, the statute does not demonstrate the existence of a public policy against the continued employment of an employee who has tested positive for drugs. Of course, as Kennecott has pointed out, the statute also authorizes an employer to terminate an employee who tests positive for the presence of drugs. However, this demonstrates only that Kennecott's decision to terminate the Employee did not violate public policy and would not have violated public policy if it would have been upheld by Arbitrator Daniels. It does not demonstrate that Arbitrator Daniels' interpretation of the CBA and the MOA violate public policy.

This Court acknowledges the clear public policy "against the performance of safety-sensitive jobs by persons under the influence of drugs." *ESSO Workers' Union, 118 F.3d at 849*. However, this policy is not clearly violated by Arbitrator Daniels' conclusion that if Kennecott uses a test capable of detecting remote marijuana use, "there must be some additional evidence of on the job impairment, possession or use" (emphasis in original). This Court is not free to review Arbitrator Daniels' factual finding that there was no evidence of on-the-job use or possession.

This is not to say that Kennecott is required to adopt a wait-and-see approach. This is only to say that if a positive test result is by itself to warrant an employee's termination, it does not offend public policy to require a reasonable

correlation between the test and the risk of on-the-job impairment.

CONCLUSION

Although the conclusion reached by Arbitrator Daniels may not be the same conclusion this Court would have reached, it draws its essence from the CBA and the MOA and, therefore, must be enforced. Accordingly, Kennecott's motion for summary judgment is denied and the Union's motion for summary judgment is granted, including an award of wages and benefits lost from the date of the Award (August 6, 1997), until Kennecott complies with the Award, plus prejudgment interest at the legal interest rate.

DATED this 11th day of May, 1998.

BY THE COURT:

s/ Dale A. Kimball
DALE A. KIMBALL
United States District Judge

APPENDIX C — AWARD OF ARBITRATOR DATED AUGUST 6, 1997

Grievance 21-96-31
(Leo Salazar)

In the Matter of the Arbitration Between

Kennecott Utah Copper Corporation

Company,

and

United Steelworkers of America,
Local 392

Union.

Award of Arbitrator

Arbitrator: Scott Daniels
For the Company: Glenn H. Schlabs
For the Union: Arthur F. Sandack

ISSUE PRESENTED FOR ARBITRATION

Did the Company have just cause to terminate the Grievant, as the term "just cause" is used in the Collective Bargaining Agreement and interpreted in accord with other agreements of the parties, including the Drug and Alcohol Abuse Policy?

And, if not, what is the proper remedy?

Appendix C

CONTRACTUAL PROVISIONS

COLLECTIVE BARGAINING AGREEMENT

Article 5.1 Discipline

No employee shall be disciplined or discharged without just cause.

Article 6 Arbitration

The arbitrator will have no power to add to, subtract from, or modify this Agreement. The decision of the arbitrator rendered pursuant to this Agreement will be final and binding.

DRUG AND ALCOHOL ABUSE POLICY

A. Prohibited Activity: The Company prohibits the following acts which are violations of this policy:

. . .

2. Working while under the influence of drugs or alcohol or while not being free from the presence of drugs.

. . .

B. Testing: . . . The Company requires, as a condition of continued employment, that employees submit to a drug and/or alcohol test under any of the following circumstances:

Appendix C

. . .

2. When an employee may have contributed to an accident involving a fatality, bodily injury, or damage to property.

. . .

Any positive drug or alcohol test or any refusal to submit to such test is a violation of this Policy.

. . .

G. *Employee Assistance Program*: Employees who are found positive on a drug or alcohol test may be referred to the EAP for assistance, but are not entitled to treatment in lieu of disciplinary action. . . .

IMPLEMENTATION AND COMPLIANCE

B. *Compliance* Compliance with this policy is a condition of employment. The Company intends to take disciplinary action, up to and including termination, against any employee who violates this Policy.

FINDINGS OF FACT

1. On July 26, 1996, Grievant was a non-probationary employee of Kennecott Utah Copper Corporation (Company), and a member of a bargaining unit

represented by United Steel Workers of America, local 392 (Union). The parties were subject to a Collective Bargaining Agreement effective October 6, 1993 and admitted as joint exhibit 1. The parties also agreed to the Drug and Alcohol Abuse Policy, dated December 28, 1994 and admitted as exhibit 3.

2. On July 26, 1996, Grievant was involved in a rollover accident with a fully loaded 10 wheel dump truck. There were no witnesses to the accident. The evidence at the accident scene indicated that Grievant had backed down a ramp and then driven the truck forward through an earthen berm. The truck then rolled over. A tie rod was found to have failed, the ball joint having come apart. This would have made the steering inoperable. A similar failure had occurred on a similar vehicle shortly prior to this accident.

3. The accident was investigated by Paul J. Pappas and David Baize, Grievant's supervisors. They found that the tire tracks on the road did not show signs of braking. The distance from the point where Grievant stopped backing down the ramp to the point of overturn was 75 feet. A fully loaded 10 wheel truck could only attain a speed of approximately 7 to 9 MPH in that distance. Based upon these facts, Pappas and Baize concluded that the cause of the accident was likely the tie-rod failure, but that Grievant had time to stop the vehicle prior to the rollover. On this basis, they concluded that the Grievant may have contributed to the accident.

4. Pappas and Baize, with concurrence of Scott Bird, the Acting Concentrator Manager, referred Grievant to the clinic for a drug test. The initial screen tested positive for cannaboids. A urine sample was sent to a lab for analysis. This sample also tested positive. Grievant requested that the sample be sent to another lab for an independent evaluation. This sample also tested positive. Pappas and Baize prepared an incident report in which Baize made an explanation as to why he had sent Grievant for drug testing.

5. There is no evidence that Grievant was impaired or under the influence of drugs or alcohol at the time of the accident or any time while on the job. There is only very slight evidence that Grievant was at fault in any way for the vehicle accident.

6. A hearing was held on July 31, 1996. At the hearing Grievant maintained that he had not used marijuana for five or six weeks. At the arbitration hearing Grievant admitted that this was a lie, and that he had smoked marijuana two days prior to the accident. He maintained that he had lied because he was afraid he would lose his job. After the hearing Baize recommended that Grievant be terminated. Bird believed that there was insufficient evidence of mitigating circumstances which would require a lesser sanction. Bird terminated Grievant solely on the basis of the drug test.

7. This grievance was timely filed.

Appendix C

DISCUSSION

DID THE COMPANY HAVE THE RIGHT TO REQUIRE A DRUG TEST?

The contractual predicate for requiring a drug or alcohol test for an employee involved in an accident is very low. It is only that the employee "may have contributed" to the accident. His conduct need not have been the sole cause of the accident, or even a primary cause. In this case, although it appears that the broken tie rod was the cause of the accident, it was not unreasonable for the Company supervisors to conclude that Grievant "may" have had the ability to apply the brakes earlier and avoid the rollover. The company was justified in requiring Grievant to submit to a drug test.

WAS FAILURE OF THE DRUG TEST, STANDING ALONE, JUST CAUSE TO TERMINATE GRIEVANT?

The Drug and Alcohol Abuse Policy, agreed to by the Union, specifies that "Any positive drug or alcohol test . . . is a violation of this Policy." The policy also clearly indicates the intent of the Company to take disciplinary action for violation, includes termination.

There are different types of drug and alcohol tests, which each provide different indications of *currently* being under the influence of a substance. For example, a blood alcohol test indicates the substance in the blood at the time of the test, while actually causing present impairment. Tests for canniboids typically measure not the drug itself, but the

metabolite of the drug and indicate only that the person has had the drug in his or her system in the previous few days. Other tests may measure the residue of the drug in the hair, weeks or months prior. Some tests can even be done on the hair of deceased people, long after death, indicating drug use before death.

The Company has a legitimate interest in preventing drug use, possession, and the influence of drugs and alcohol *on the job*. This is a vital concern and is critical not only to the Company, but to every employee who must work near dangerous equipment which is operated by fellow employees. In some cases, the Company has a legitimate interest in the employees' use of drugs and alcohol off the job as well, but these instances are rare unless the off the job drug use affects the employee's performance on the job. Further, the employee has a right to privacy while off the job and is entitled to be more free from Company control.

I do not believe that a positive drug test is a proper ground for discipline if it does not indicate on the job use or possession of drugs or working under the influence of drugs or alcohol. For example, if the Company required a drug test of the hair which indicated drug use at some point in the last sixth months, I do not believe an employee would be subject to discipline without some other indication that the drug use was somehow connected to the job. On the other hand, a positive result on a blood alcohol test which measures present impairment, standing entirely alone, would be sufficient cause for discipline. In general, the more remote drug use a test may detect, the more additional evidence of on the job use or impairment is required for discipline.

Appendix C

The testimony in the arbitration was that marijuana is active in the body for about 3 hours. It can remain active for as long as eight hours. The drug test, however, may be positive for a week to ten days. Therefore, in order to discipline, especially terminate, an employee for a positive result on this particular test, there must be *some* additional evidence of on the job impairment, possession or use.

In this case there is no evidence of on the job use or possession. Neither is there substantial evidence of the influence of a drug while on the job. Although there was some testimony that Grievant appeared shaken and quiet after the accident, this is hardly unusual considering he had just rolled over with a 10 wheel truck. There was no evidence of dilated eyes, marijuana smell, bizarre behavior, or any other indication. The *sole* reason was the positive drug test, and this, standing entirely alone, is not enough to create just cause to terminate.

WAS THE COMPANY OBLIGATED TO OFFER GRIEVANT THE EMPLOYEE ASSISTANCE PROGRAM?

There was some evidence at the hearing that the Company and Union agreed that employees would not be terminated solely for a positive drug test on the first offence. The disposition of this case makes this issue moot for this decision, and no ruling is made on this issue.

Appendix C

WHAT SHOULD THE APPROPRIATE REMEDY BE?

As Grievant was terminated without just cause, he should be returned to work without loss of seniority. He was not entirely without fault, however. It is understandable that he would lie about his drug use, because he was afraid. Nevertheless, it is likely that his discipline would have been less than termination if he had told the truth about his drug use from the beginning. Therefore, Grievant is not entitled to an award for back pay.

AWARD

Grievant is to be returned to work without loss of seniority, but without back pay.

Dated this 6 day of August, 1997

s/ Scott Daniels
Scott Daniels, Arbitrator

APPENDIX D — DRUG AND ALCOHOL ABUSE POLICY OF KENNECOTT UTAH COPPER CORPORATION

DRUG AND ALCOHOL ABUSE POLICY

APPLICABILITY

This Policy shall be applicable to all Kennecott employees subject to applicable law.

STATEMENT OF POLICY

It is the policy of the Company to provide a safe workplace for all its employees. Consistent with this policy is the Company's commitment to maintain a workplace that is free from the effects of alcohol and drugs and to offer assistance to all employees who are experiencing alcohol or drug related problems and who voluntarily seek this assistance.

The Company recognizes that drug and alcohol abuse are potentially treatable health problems and that early recognition and intervention are important for successful rehabilitation. Employees needing help in overcoming chemical dependency may voluntarily seek treatment through the Employee Assistance Program (EAP) before violating this policy.

A. *Prohibited Activity*: The Company prohibits the following acts which are violations of this Policy:

1. Selling, possessing, using, transferring, or purchasing drugs or alcohol on Company time or property or while in a Company vehicle.

2. Working while under the influence of drugs or alcohol or while not being free from the presence of drugs.

3. The sale of drug paraphernalia on Company property.

For purposes of this Policy, the term "drugs" includes the controlled substances listed below, synthetic drugs, and prescription drugs, excepting only prescription drugs approved by and used in accordance with the directions of an employee's attending physician:

Marijuana (Cannabinoids)	Barbiturates
Cocaine	Benzodiazepines
Opiates	Propoxyphene
Phencyclidine (PCP)	Methadone
Amphetamines	

Any employee using a prescription drug should consult with their physician regarding the effects of the medication in relation to the performance of the employee's job responsibilities. Employees taking prescription medications that may cause drowsiness or mood alteration must notify their supervisor who may restrict work activities.

B. *Testing*: The Company requires all applicants to be tested for drugs and/or alcohol upon hiring. All offers of employment are conditional on passing a drug and/or alcohol test.

The Company requires, as a condition of continued employment, that employees submit to a drug and/or alcohol test under any of the following circumstances:

Appendix D

1. When the Company has a reasonable suspicion that an employee is under the influence or is impaired by drugs or alcohol while on Company property or in a Company vehicle. A reasonable suspicion must be based upon specific, personal observations that a supervisory employee can articulate concerning the appearance, behavior, speech or body odors of the employee.

2. When an employee may have contributed to an accident involving a fatality, bodily injury, or damage to property.

3. When follow-up testing is a required part of a rehabilitation program under the EAP.

4. When testing is required to comply with applicable law.

Any positive drug or alcohol test or any refusal to submit to such test is a violation of this Policy.

Before requesting an employee to submit to a drug and/or alcohol test, the employee's supervisor must seek the approval of his or her immediate supervisor. The supervisor requesting a drug and/or alcohol test must, as soon as practical, write a narrative report of the information and observations which gave rise to the request to take a drug and/or alcohol test.

Following a drug and/or alcohol test, the employee tested may be suspended without pay until the results are

received. If the test results are negative, the employee shall be made whole for all time lost and benefits the employee would have otherwise received.

C. *Screening, Confirmation and Testing Thresholds*: A test result will be regarded as positive if the concentration of the drug metabolite equals or exceeds the limits and conditions set forth in the table of Appendix "A" or if the alcohol test exceeds 0.08. Alcohol testing shall be conducted using a single quantitative blood test or using a Department of Transportation approved evidential breath measurement device, following a two stage testing protocol.

An employee testing positive shall have the right to have the secured portion of the urine or blood sample that tested positive, independently analyzed by a Department of Health and Human Services certified laboratory of his/her choice and at his/her expense for up to one year. If the independent test is negative, the employee shall be reimbursed for the cost of such independent test.

D. *Exception for Medical Treatment*: In the case of a positive test result, the employee shall be so advised by the Company's medical review officer, on a confidential basis, prior to the reporting of the results to the Company, and the employee shall have the right to discuss and explain the results, including the right to advise the medical review officer of any medication prescribed by the employee's physician, which may have affected the results of the test.

Appendix D

If it is determined that there is a legitimate medical explanation for a positive test result, the Company shall regard the results as consistent with legal drug use and take no further action.

E. *Laboratory Records*: All relevant records shall be available for inspection by any employee who has been tested, upon the employee's request. Such records will be treated as confidential and released only to the employee or the employee's designee or to Company personnel designated as having a bona fide need to know.

F. *Laboratory Selection*: The Company will identify and contract with a laboratory certified by the Department of Health and Human Services to perform drug tests.

G. *Employee Assistance Program*: Employees who are found positive on a drug or alcohol test may be referred to the EAP for assistance, but are not entitled to treatment in lieu of disciplinary action. If the employee enters such a program, his/her status as an employee will not be affected and the Company will endeavor to make reasonable accommodation for the employee's participation in the EAP.

Successful completion of the EAP rehabilitation program may be required by the Company as a condition of employment.

H. *Retesting*: Employees who fail a drug and/or alcohol test and agree to enter the EAP rehabilitation program are subject to medically-supervised tests to detect any

continued use of alcohol or drugs with or without cause, at any time, within a one-year period following the employee's return to work for the Company.

IMPLEMENTATION AND COMPLIANCE

A. *Implementation Responsibility*: Every executive reporting to the President and every General Manager or senior official at each business location is responsible for:

1. Fully understanding and implementing this Policy.

2. Posting the Policy and assuring that every employee in their organization understands this Policy and Kennecott's commitment to a drug and alcohol free environment.

B. *Compliance*: Compliance with this Policy is a condition of employment. The Company intends to take disciplinary action, up to and including termination, against any employee who violates this Policy.

INTERPRETATION OF POLICY

The Vice President Human Resources is responsible for interpreting this Policy and providing advice and counsel as to its implementation throughout Kennecott.

Appendix D

APPENDIX A

SCREENING CUTOFFS

Substance	Initial Test Levels (ng/ml)
Marijuana Metabolites	50
Cocaine Metabolites	300
Opiate Metabolites	300
Phencyclidine	25
Amphetamines	1,000
Barbiturate Metabolites	300
Benzodiazepine Metabolites	300
Methadone	300
Propoxyphene	300

Appendix D

CONFIRMATORY CUTOFFS

Substance	Confirmatory Test Levels (ng/ml)
Marijuana Metabolites[1]	15
Cocaine Metabolites[2]	150
Opiates	
Morphine	300
Codeine	300
Phencyclidine	25
Amphetamines	
Amphetamine	500
Methamphetamine	500
Barbiturate Metabolites[3]	300
Benzodiazepine Metabolites[4]	300
Methadone[5]	300
Propoxyphene[5]	300

(1) Delta-9-Tetrahydrocannabinol-9-Carboxylic Acid

(2) Benzoylecgonine

(3) Amylbarbital, secobarbital, butalbital, butabarbital, pentobarbital and phenobarbital

(4) Oxazepams, diazepams

(5) Full Scan GC/MS Confirmation

APPENDIX E — RELEVANT STATUTES

Utah Code Ann. § 34-38-1

34-38-1. Legislative findings — Purpose and intent of chapter. The Legislature finds that a healthy and productive work force, safe working conditions free from the effects of drugs and alcohol, and maintenance of the quality of products produced and services rendered in this state, are important to employers, employees, and the general public. The Legislature further finds that the abuse of drugs and alcohol creates a variety of workplace problems, including increased injuries on the job, increased absenteeism, increased financial burden on health and benefit programs, increased workplace theft, decreased employee morale, decreased productivity, and a decline in the quality of products and services.

Therefore, in balancing the interests of employers, employees, and the welfare of the general public, the Legislature finds that fair and equitable testing for drugs and alcohol in the workplace, in accordance with this chapter, is in the best interest of all parties.

The Legislature does not intend to prohibit any employee from seeking damages or job reinstatement, if action was taken by his employer based on a false drug or alcohol test result.

* * *

Appendix E

Utah Code Ann. § 34-38-2

34-38-2. Definitions. For purposes of this chapter:

(1) "Alcohol" means ethyl alcohol or ethanol.

(2) "Drugs" means any substance recognized as a drug in the United States Pharmacopoeia, the National Formulary, the Homeopathic Pharmacopoeia, or other drug compendia, or supplement to any of those compendia.

(3) "Employer" means any person, firm, or corporation, including any public utility or transit district, which has one or more workers or operators employed in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written. "Employer" does not include the federal or state government, or other local political subdivisions.

(4) "Employee" means any person in the service of an employer, as defined by Subsection (3), for compensation.

(5) "Prospective employee" means any person who has made application to an employer, whether written or oral, to become his employee.

(6) "Sample" means urine, blood, breath, saliva, or hair.

* * *

Appendix E

Utah Code Ann. § 34-38-3

34-38-3. Testing for drugs or alcohol. It is not unlawful for an employer to test employees or prospective employees for the presence of drugs or alcohol, in accordance with the provisions of this chapter, as a condition of hiring or continued employment. However, employers and management in general must submit to the testing themselves on a periodic basis.

* * *

Utah Code Ann. § 34-38-4

34-38-4. Samples — Identification and collection. In order to test reliably for the presence of drugs or alcohol, an employer may require samples from his employees and prospective employees, and may require presentation of reliable identification to the person collecting the samples. Collection of the sample shall be in conformance with the requirements of Section **34-38-6**. The employer may designate the type of sample to be used for testing.

* * *

Utah Code Ann. § 34-38-5

34-38-5. Time of testing — Cost of testing and transportation. (1) Any drug or alcohol testing by an employer shall occur during or immediately after the regular work period of current employees and shall be deemed work time for purposes of compensation and benefits for current employees.

(2) An employer shall pay all costs of testing for drugs or alcohol required by the employer, including the cost of transportation if the testing of a current employee is conducted at a place other than the workplace.

* * *

Utah Code Ann. § 34-38-6

34-38-6. Requirements for collection and testing. All sample collection and testing for drugs and alcohol under this chapter shall be performed in accordance with the following conditions:

(1) the collection of samples shall be performed under reasonable and sanitary conditions;

(2) samples shall be collected and tested with due regard to the privacy of the individual being tested, and in a manner reasonably calculated to prevent substitutions or interference with the collection or testing of reliable samples;

(3) sample collection shall be documented, and the documentation procedures shall include:

(a) labeling of samples so as reasonably to preclude the probability of erroneous identification of test results; and

(b) an opportunity for the employee or prospective employee to provide notification of any information which he considers relevant to the test, including identification of currently or recently used prescription or nonprescription drugs, or other relevant medical information.

(4) Sample collection, storage, and transportation to the place of testing shall be performed so as reasonably to preclude the probability of sample contamination or adulteration; and

(5) sample testing shall conform to scientifically accepted analytical methods and procedures. Testing shall include verification or confirmation of any positive test result by gas chromatography, gas chromatography-mass spectroscopy, or other comparably reliable analytical method, before the result of any test may be used as a basis for any action by an employer under Section **34-38-8**.

* * *

Utah Code Ann. § 34-38-7

34-38-7. Employer's written testing policy — Purposes and requirements for collection and testing — Employer's use of test results. (1) Testing or retesting for the presence of drugs or alcohol by an employer shall be carried out within the terms of a written policy which has been distributed to employees and is available for review by prospective employees.

(2) Within the terms of his written policy, an employer may require the collection and testing of samples for the following purposes:

(a) investigation of possible individual employee impairment;

(b) investigation of accidents in the workplace or incidents of workplace theft;

(c) maintenance of safety for employees or the general public; or

(d) maintenance of productivity, quality of products or services, or security of property or information.

(3) The collection and testing of samples shall be conducted in accordance with Sections **34-38-4**, **34-38-5**, and **34-38-6**, and need not be limited to circumstances where there are indications of individual, job-related impairment of an employee or prospective employee.

(4) The employer's use and disposition of all drug or alcohol test results are subject to the limitations of Sections **34-38-8** and **34-38-13**.

* * *

Utah Code Ann. § 34-38-8

34-38-8. Employer's disciplinary or rehabilitative actions. Upon receipt of a verified or confirmed positive drug or alcohol test result which indicates a violation of the employer's written policy, or upon the refusal of an employee or prospective employee to provide a sample, an employer may use that test result or refusal as the basis for disciplinary or rehabilitative actions, which may include the following:

(1) a requirement that the employee enroll in an employer-approved rehabilitation, treatment, or counseling program, which may include additional drug or alcohol testing, as a condition of continued employment;

(2) suspension of the employee with or without pay for a period of time;

(3) termination of employment;

(4) refusal to hire a prospective employee; or

(5) other disciplinary measures in conformance with the employer's usual procedures, including any collective bargaining agreement.

* * *

Utah Code Ann. § 34-38-9

34-38-9. No cause of action for failure to test or detect substance or problem, or for termination of testing program. No cause of action arises in favor of any person against an employer who has established a policy and initiated a testing program in accordance with this chapter, for any of the following:

(1) failure to test for drugs or alcohol, or failure to test for a specific drug or other substance;

(2) failure to test for, or if tested for, failure to detect, any specific drug or other substance, disease, infectious

agent, virus, or other physical abnormality, problem, or defect of any kind; or

(3) termination or suspension of any drug or alcohol testing program or policy.

* * *

Utah Code Ann. § 34-38-10

34-38-10. No cause of action arises against employer unless false test result — Presumption and limitation of damages in claim against employer. (1) No cause of action arises in favor of any person against an employer who has established a program of drug or alcohol testing in accordance with this chapter, and who has taken any action under Section **34-38-8**, unless the employer's action was based on a false test result.

(2) In any claim, including a claim under Section **34-38-11**, where it is alleged that an employer's action was based on a false test result:

(a) there is a rebuttable presumption that the test result was valid if the employer complied with the provisions of Section **34-38-6**; and

(b) the employer is not liable for monetary damages if his reliance on a false test result was reasonable and in good faith.

* * * *

Supreme Court, U.S.
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(2)

No. 99-1268

IN THE

Supreme Court of the United States

KENNECOTT UTAH COPPER CORPORATION,
Petitioner,

v.

GEORGE BECKER; WAYNE HOLLAND, JR.; TOM PERFILI;
SUBDISTRICT 5, UNITED STEELWORKERS OF AMERICA;
LOCAL 392, UNITED STEELWORKERS OF AMERICA;
AFL-CIO/CLC,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF OF RESPONDENTS IN OPPOSITION

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

Respondents George Becker; Wayne Holland, Jr.; Tom Perfili; Subdistrict 5, United Steelworkers of America; Local 392, United Steelworkers of America; and United Steelworkers of America, AFL-CIO/CLC (collectively "USWA") submit this brief in opposition to the petition for *certiorari* filed by Petitioner Kennecott Utah Copper Corporation ("Kennecott") in No. 99-1268, which seeks review of the decision in *Kennecott Utah Copper Corp. v. Becker*, 195 F.3d 1201 (10th Cir. 1999).

ARGUMENT

1. The sole question decided by the Court of Appeals and presented by this case is this: does the public policy stated in the Utah Drug and Alcohol Testing statute, Utah Code Ann. § 34-38-1 to 14, preclude enforcement of a labor arbitration award that orders reinstatement of an employee discharged for a positive drug test, where (i) the statute permits but does not require Utah employers to drug and alcohol test their Utah employees; (ii) the statute does not mandate any penalty or discipline for an employee who tests positive; and (iii) the permissible drug testing is not limited to employees holding safety sensitive jobs and there is no finding by the arbitrator, the district court, or the Court of Appeals, that the discharged employee held a safety sensitive position.[1]

The Court of Appeals answered this question "no." Its decision is consistent with *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987), the leading public policy/labor arbitration decision of this Court. In *Misco* this Court held "that a court's refusal to enforce an arbitrator's *interpretation* of [collectively-bargained] contracts is limited to situations where the contract as interpreted would violate 'some explicit public policy' that is 'well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests."'" 484 U.S. at 43 (quoting *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983) (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945))). And, as the Court of Appeals recognized, the Utah law's blanket permission to Utah employers to drug test any and all of their employees, simply does not state a "public policy" that precludes enforcement of any and all labor arbitration awards that conclude that, given the

---

[1] This arbitration concerns a Kennecott employee who drove a dump truck inside the confines of a Kennecott open pit copper mine.

terms of the governing collective bargaining agreement and all the facts and circumstances, a particular employee's positive drug test is not just cause for discharge and that the employee should be reinstated to his job. Indeed, the Utah statute specifically states that the employer may take actions "in conformance with the employer's usual procedures, including any collective bargaining agreement." Utah Code Ann. § 34-38-8(5). So far as our research on the *certiorari* petition shows, no Court of Appeals has ever ruled that a law like the Utah law precludes the enforcement of a labor arbitration award like the one here.

Equally to the point, the question presented here and the decision below are entirely distinct from the public policy/labor arbitration question presented in *Eastern Assoc'd Coal Corp. v. United Mine Wkrs, Dist. 17*, No. 99-1038 (*certiorari* granted March 20, 2000) and from the conflicting Court of Appeals decisions considering that question.[2] As stated in the *Eastern Assoc'd Coal Corp. certiorari* petition, the questions presented in that case are:

> (1) Is there well defined and dominant public policy that prohibits enforcement of arbitration awards requiring reinstatement to safety-sensitive positions of employees who test positive for illegal drugs, as First, Third, Fifth, Eighth, and Eleventh Circuits have held, or, as Second, Sixth, Ninth, Tenth, and now Fourth Circuits have held, does no such policy exist and must courts therefore uphold reinstatement to safety-sensitive positions of those who test positive for illegal drugs?

---

[2] We recognize that if this case did indeed raise a variation on the question presented in *Eastern Assoc'd Coal Corp.*, it would be proper to hold the *certiorari* petition here for later consideration in light of the Court's decision on the merits in *Eastern Assoc'd Coal*. But for the reasons given in the text, we submit that the question presented here and in that case are distinguishable and therefore the *certiorari* petition here should be denied.

> (2) Should arbitration award be vacated on public policy grounds only when award itself violates positive law or requires unlawful conduct by employer, as Fourth, Ninth, and District of Columbia Circuits have held, or, as First, Third, Fifth, Seventh, Eighth, and Eleventh Circuits have held, may such award violate public policy without violating positive law -- question on which this court granted certiorari, but did not reach, in *United Paperworkers International Union v. Misco Inc.*, 484 U.S. 29 (1987)?

As that *certiorari* petition shows, there is, indeed, a lower court dispute as to whether public policy precludes the enforcement of arbitration awards concluding that a positive drug test is not just cause for a discharge from a *safety sensitive* job and providing for reinstatement of the employee to such a job. But the critical point is that all the Courts of Appeals that answer the question "yes" predicate their conclusion on a public *safety* policy implicated by the *safety sensitive* nature of the job to which the employee seeks reinstatement. No Court of Appeals has ever refused enforcement of a labor arbitration decision on public policy grounds where the employee job at issue was not found to be a safety sensitive job which if improperly performed posed risks to public safety.[3]

---

[3] *Exxon Corp. v. Esso Workers' Union*, 118 F.3d 841, 843, 848-849 (1st Cir. 1997) ("[The discharged employee Smith] typically drives this rig through many of New England's more densely populated areas. Exxon requires employees who occupy designated *safety-sensitive positions—and Smith's is plainly such a position*—to sign so-called compliance statements . . . [agreeing to] random drug testing. . . . In our judgment, society has achieved a broad national consensus that persons should not be allowed to endanger others while laboring under the influence of drugs. This consensus is made manifest by positive law and translates into a well defined and dominant policy public policy--indeed, a national crusade--counseling against the performance of *safety-sensitive tasks* by individuals who are so impaired. . . . The pertinent public policy dictates not only that employees refrain from

performing *safety-sensitive jobs* while under the influence of drugs but also that employers develop (and enforce) programs designed to discourage such activity") (emphasis added); *Exxon Corp. v. Baton Rouge Oil*, 77 F.3d 850, 854, 856 (5th Cir. 1996) ("The Union admits that *a public policy against drug use in safety sensitive positions exists; . . .* It is undisputed that [the discharged employee] *occupied a safety-sensitive position*") (emphasis added); *Exxon Shipping Co. v. Exxon Seamen's Union*, 73 F.3d 1287, 1289 (3d Cir. 1996) ("Although Coast Guard regulations do not mandate discharge for an employee--*even one in a safety sensitive position*--who refuses a drug test, we conclude that if Exxon had cause to require a test [the employee's] reinstatement following his refusal would violate public policy because it would undercut enforcement of *Coast Guard regulations and environmental statutes which denote a well defined and dominant public policy against permitting intoxicated crew members to operate oil tankers and other common carriers*") (emphasis added); *Exxon Shipping Co. v. Exxon Seaman's Union*, 11 F.3d 1189, 1196, (3d Cir. 1993) ("we conclude that there is a *well defined and dominant policy that owners and operators of oil tankers should be permitted to discharge crew members who are found to be intoxicated while on duty. An intoxicated crew member on such a vessel can cause loss of life and catastrophic environmental and economic injury.* Some of this injury may not be reparable by money damages. Moreover, under the Clean Water Act and the Oil Pollution Act, it is entirely possible that much of the cost resulting from a major oil spill may fall on taxpayers and those who are injured by the accident") (emphasis added); *Union Pacific R. Co. v. UTU*, 3 F.3d 255, 262 (8th Cir. 1993) ("*What violates public policy in this case is the Board's decision to reinstate to his former position a railroad employee who poses a significant risk to the public* because of his potential for future drug use on the job") (emphasis added); *Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357 (3d Cir. 1993) ("we hold the award reinstating [the employee] violates the *public policy protecting the public and the environment against operation of vessels by drug users*") (emphasis added); *Gulf Coast Industrial Workers v. Exxon Co., USA*, 991 F.2d 244, 256 (5th Cir. 1993) ("We conclude that compelled continued employment of Woods in *a safety-sensitive* position is sufficient to represent a plain violation of 'well defined and dominant' public policy") (emphasis added); *Delta Airlines, Inc. v. ALPA*, 861 F.2d 665, 674 (11th Cir. 1988) ("What [the employee] did as performance of his employment is the very thing which *offends public policy. He flew an airplane while drunk and endangered the lives of his passengers and crew*") (emphasis added).

By the same token, all of these Courts of Appeals relied on a far more pointed expression of public policy than the mere blanket permission to employers to drug test employees relied on by petitioner Kennecott here.[4]

We note, in this regard, the *certiorari* petition misstates the Court of Appeals' response to Kennecott's reliance on *Exxon*

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[4] *See, Exxon Corp. v. Esso Workers' Union*, 118 F.3d 841, 848 (1st Cir. 1997) (citing various state laws criminalizing the operation of commercial motor vehicles by persons who are under the influence of alcohol or controlled substances, and citing federal statutes and regulations requiring the establishment of drug and alcohol testing and other programs for operators of commercial motor vehicles); *Exxon Corp. v. Baton Rouge Oil*, 77 F.3d 850, 851, 856 (5th Cir. 1996) and *Gulf Coast Industrial Workers v. Exxon Co., USA*, 991 F.2d 244, 250 (5th Cir. 1993) (citing fact that the employer is "bound as a government contractor" to comply with the Drug-Free Workplace Act, 41 U.S.C. §§ 701-707, which requires a contractor to have "certified to the contracting [federal] agency that it will provide a drug free workplace" and citing similar Defense Department regulations, 48 C.F.R. 223.5); *Exxon Shipping Co. v. Exxon Seamen's Union*, 73 F.3d 1287, 1292-1293 (3d Cir. 1996), *Exxon Shipping Co. v. Exxon Seaman's Union*, 11 F.3d 1189, 1193 (3d Cir. 1993), and *Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357, 360-361 (3d Cir. 1993) (citing Coast Guard regulations requiring that employees on vessels testing positive for drugs "shall be denied employment . . . or removed from [safety sensitive] duties (46 C.F.R. § 16.201(c)), prohibiting those employees from returning to work aboard a vessel absent proof of rehabilitation (46 C.F.R. § 16.370(d)), and criminalizing intoxication by crew members on duty (33 C.F.R. § 95.055); *Union Pacific R. Co. v. UTU*, 3 F.3d 255, 261-262 (8th Cir. 1993) (citing Federal Railroad Administration regulations prohibiting railroad employees' usage of alcohol or drugs while on duty and from reporting for duty while under the influence (49 C.F.R. § 219.101), prohibiting usage of controlled substances at any time, whether on duty of off (49 C.F.R. § 219.201), establishing a mandatory comprehensive testing scheme (49 C.F.R. § 219.201, 301, 501, 601); *Delta Airlines, Inc. v. ALPA*, 861 F.2d 665 (11th Cir. 1988) (citing Federal Aviation Administration regulations forbidding an employee from acting as a crewmember of a civil aircraft within 8 hours after consumption of alcohol).

Corp. v. Esso Workers' Union, supra, 118 F.3d 841. As already indicated, in *Exxon Corp.*, the First Circuit concluded that public policy "dictates not only that employees refrain from performing safety-sensitive jobs while under the influence of drugs but also that employers develop (and enforce) programs designed to discourage such activity." 118 F.3d at 849. The First Circuit concluded that in accordance with "the discerned public policy, we hold that forcing an employer to reinstate an employee who tests positive for drug use pursuant to a test that the employer administers as a part of a drug-free workplace [Drug Free Workerplace Act, 41 U.S.C. § 701 *et seq.*] program would undermine that policy." *Id.* at 850.

Contrary to Kennecott's contention, the Court of Appeals did not "expressly reject[ ] the public policy found by the First Circuit" (Pet. 12). Rather, the court below found it "easy to be sympathetic to the expanded policy," but it "question[ed] whether [as urged by Kennecott] a federal court's finding of a violation of this policy in *every* positive drug test case, without regard to the specific facts . . . can be squared with the Supreme Court's admonition that case-specific facts matter and it is the province of the arbitrator, and not the courts, to find such facts" (Pet. 15a) (emphasis added). The Court of Appeals determined that it did not have to answer the question of the applicability of the "expanded policy" in every instance in which an employee tested positive for drugs because, "[i]n any event, Kennecott does not rely upon the same provisions at issue in *Exxon Corp. v. Esso Workers' Union, Inc.*, 118 F.3d at 847-848, and its reliance upon the various sections of Utah law discussed above is not persuasive to demonstrate the alleged public policy" (Pet. 15a). Thus, the Court of Appeals did not reject the expanded public policy relied upon by the First Circuit in *Exxon Corp.* Rather, the court below concluded that given the facts in this case, including the nature of the job and the terms of the Utah law, the "expanded policy" had no application in this instance.

2. Kennecott also contends that the petition for *certiorari* should be granted because the arbitrator's award did not draw its essence from the contract (Pet. 17-25). Kennecott's claim in this regard is that the collectively-bargained agreements between the USWA and Kennecott unequivocally guarantee Kennecott the unchallengeable discretion to terminate an employee who tests positive on a drug test. The arbitrator rejected that claim, and, as the Court of Appeals pointed out, the claim is "simply a matter of interpretation" and under this Court's well-settled law "a reviewing court may not substitute its interpretation for that of the arbitrator" (Pet. 8a). In this the court below was entirely correct and the *certiorari* petition does not even claim that the decision is in conflict with that of any other court.[5]

---

[5] Similarly, Kennecott's claim that the arbitrator "added a requirement" (Pet. 21-22) to the contract through his interpretation of the requirements of just cause to discharge and "relied on his own notions of a 'proper' drug testing policy" (Pet 24) in suggesting that even discipline under the agreements required some evidence of on-the-job impairment possession or use, simply reflects the depth of Kennecott's disagreement with the arbitrator's interpretation of the collective bargaining agreement and raises no legal issue of substance.

CONCLUSION

For the reasons stated, the petition for *certiorari* should be denied.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner Kennecott Utah Copper Corporation ("Kennecott") submits this Reply in support of its Petition for a Writ of Certiorari. Kennecott has identified two splits among the Circuit Courts concerning the public policy exception to the enforcement of arbitration awards.[1] The Circuit Courts are divided over: (a) the existence of a public policy that encourages employers to eliminate employee drug use in safety sensitive positions by creating and enforcing drug-free workplace policies; and (b) the relevance of public policies that do not expressly forbid the arbitrator's stated remedy. (Pet. at 9-17.) The Tenth Circuit in its decision below sided with the Second and Ninth Circuits, and expressly rejected the positions of the First, Third, Fifth, Eighth and Eleventh Circuits on these issues.

The Tenth Circuit's ruling that the Arbitration Award drew its essence from the collective bargaining agreement ("CBA") conflicts with relevant decisions of this Court. The Arbitrator ignored the plain meaning of the CBA, exceeded his authority under the CBA, and imposed his own brand of industrial justice. (Pet. at 17-25.)

Respondents Becker, Holland, Perfili, and Subdistrict 5 and Local 392 of the United Steelworkers of America (collectively "Respondents") have filed a Brief in Opposition ("Opp.") to Kennecott's Petition. Respondents attempt to distinguish the present case from other public policy cases. In so doing, Respondents only cloud the differences among the Circuit Courts. The differences themselves remain, and this Court should grant the Petition to unify national labor policy on these issues.

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1. Courts must refuse to enforce arbitration awards that contravene public policy. *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987).

FURTHER REASONS FOR GRANTING THE WRIT

I.

THE ISSUES PRESENTED HERE CONCERNING DRUG USE IN SAFETY SENSITIVE POSITIONS COMPLEMENT THE ISSUES PRESENTED IN *EASTERN ASSOCIATED COAL.*

This Court has recently granted a writ of certiorari in *Eastern Associated Coal Corp. v. United Mine Workers of America, Dist. 17*, 68 U.S.L.W. 3585 (U.S. March 21, 2000) (No. 99-1038). In *Eastern Associated*, as here, the grievant was reinstated into a position driving a heavy-duty truck despite testing positive for drug use.[2] In *Eastern Associated*, as here, the Court of Appeals enforced the arbitration award because reinstatement was not illegal. The only difference between *Eastern Associated* and the present case is that, while *Eastern Associated* principally relies on Department of Transportation regulations as the source of public policy, Kennecott principally relies on a state statute specifically authorizing employers to create and enforce drug-free workplace policies. Deciding the present case in conjunction with *Eastern Associated* would resolve the issues relating to the enforcement of drug-free workplace policies both for employers operating under federal regulatory drug testing and for employers implementing state statutory drug policy.

---

2. Contrary to Respondents' assertion (Opp. at 3-4), both the instant case and *Eastern Associated* involve reinstatement to a safety sensitive position. *See* Part II A., *infra*.

II.

THE CIRCUIT COURTS DISAGREE WHETHER PUBLIC POLICY FORBIDS DRUG USE BY EMPLOYEES IN POSITIONS THAT THREATEN THE SAFETY OF THE EMPLOYEES THEMSELVES, CO-WORKERS AND THE PUBLIC.

Respondents acknowledge that the Circuit Courts are divided over the application of the public policy exception where employees test positive for drug use. (Opp. at 4.) Respondents mistakenly argue, however, that this split is solely related to concerns for *public* safety, as opposed to workplace safety. (*Id.*)

A. The Grievant Occupied A Safety Sensitive Position.

Respondents assert that the finders of fact in this case did not find that the grievant occupied a safety sensitive position. (Opp. at 2.) The grievant was driving a fully loaded ten-wheel dump truck when it turned over. (*See* App. 3a, 17a, 27a.) The need for safe operation of such a vehicle is paramount. Evidently, Respondents' meaning is that the grievant posed no risk *to the public* because he operated the dump truck on Kennecott's property. (Opp. at 2 n.1.) The Arbitrator understood that the grievant's proscribed conduct posed risks to himself and to co-workers. (*See* App. 30a [Kennecott's interest in preventing drug use was "a vital concern . . . not only to the Company, but to every employee who must work near dangerous equipment which is operated by fellow employees"].)

B. The Circuit Courts Have Not Distinguished Between Public Safety And Workplace Safety.

Respondents assert that all the Circuit Courts that have blocked enforcement of arbitration awards for reasons related to the employees' drug use have been concerned with *public* safety. (Opp. at 4.) Contrary to Respondents' position, many of the cases blocking enforcement of arbitration awards involve risks only to the employee him- or herself and to co-workers, or involve risks to both employees and the public. *See, e.g., Exxon Corp. v. Baton Rouge Oil*, 77 F.3d 850, 856 (5th Cir. 1996) (employee supervised olefin purification and posed risk to "his company and to fellow employees"); *Union Pacific R. Co. v. UTU*, 3 F.3d 255, 256, 262 (8th Cir. 1993) (reinstatement of railyard brakeman conflicted with public policy protecting employees themselves, co-workers and the public); *Delta Airlines, Inc. v. ALPA*, 861 F.2d 665 (11th Cir. 1988) (reinstatement of airline pilot conflicted with public policy protecting passengers and crew).[3]

Moreover, the decisions of other Circuit Courts *enforcing* arbitration awards despite employees' positive

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3. Other "safety sensitive positions" affect other public interests, including the environment. *See, e.g., Exxon Shipping Co. v. Exxon Seaman's Union*, 11 F.3d 1189, 1190, 1196 (3d Cir. 1993) and other *Exxon* cases cited in the Petition, applying public policies that protect "safe operation of the ship" even when at anchor, and prevent loss of life, environmental damage and economic injury. The Federal Mine Safety and Health Review Commission has also recognized that drug-free workplace policies serve public interests in safety, health and productivity. *Sec. on behalf of Price and Vacha v. Jim Walter Resources, Inc.*, 12 F.M.S.H.R.C. 1521, 1531-32 (1990).

drug tests have involved threats to *public* safety. *See, e.g., Int'l Bhd. of Elec. Workers, Local 97 v. Niagara Mohawk Power Corp.*, 143 F.3d 704, 707 (2d Cir. 1998) (employee responsible for effluents from nuclear facility); *United Food and Commercial Workers Int'l Union, Local 588 v. Foster Poultry Farms*, 74 F.3d 169, 171 (9th Cir. 1995) (commercial vehicle operators); *Stead Motors v. Automotive Machinists Lodge No. 1173*, 886 F.2d 1200, 1202 (9th Cir. 1989) (mechanic who repeatedly failed to tighten lug nuts on customer automobiles). Respondents' classification of the cases according to the Circuit Courts' concern for *public* safety is illusory. All these Circuit Courts have been concerned with the application of public policies concerning drug use to "jobs that pose a threat to the safety *of the other workers and/or the general public*." *Baton Rouge Oil*, 77 F.3d at 854 (emphasis added).

C. The Circuit Courts Are Split Over The Relevance of Public Policies That Do Not Expressly Forbid Reinstatement.

In a second attempt to distinguish this case from other public policy cases blocking enforcement of arbitration awards for reasons related to drug use, Respondents contend that the public policies cited in the other cases were "far more pointed" than the Utah statute and federal precedent on which Kennecott relies. (Opp. at 6.) According to the parenthetical descriptions of the cases cited in their brief, Respondents mean that the expressions of public policy on which those other cases rely were statutes and regulations imposing *duties* on employers or employees. (*See id.* at 6 n.4.) In contrast, Respondents argue, the Utah statute merely *permits* employers to conduct drug tests and does not forbid reinstatement. (*Id.* at 2, 6.)

Respondents' position ignores the second split among the Circuit Courts. The Second, Ninth and Tenth Circuits have held that the public policy exception applies only when the public policy expressly *forbids* the relief granted in the award. (Pet. at 14.) The First, Third, Fifth, Eighth and Eleventh Circuits all have a more flexible view, applying the public policy exception whenever the contract as interpreted in the award undermines the public policy goal of preventing drug use in safety sensitive positions. (Pet. at 15.) *See, e.g., Exxon Shipping Co. v. Exxon Shipping Union*, 73 F.3d 1287, 1294-95 (3d Cir. 1996) (though regulations do not mandate discharge, reinstatement would undercut public policy). The more flexible approach, which the Tenth Circuit rejected, would bar enforcement of the Award at issue here, especially in light of Congress' determination that mine operators

> have the final responsibilities for affording safe and healthful workplaces for miners, and therefore, have the responsibility for developing and enforcing through appropriate disciplinary measures, effective safety programs that could prevent employees from engaging in unsafe and unhealthful activity.

Western Fuels - Utah, Inc. v. Sec. of Labor, 10 F.M.S.H.R.C. 256, 261 (1988) (quoting S. Rep. No. 95-181 at 18 (1977)). *See also* 30 C.F.R. § 57.20001 (1999) ("[p]ersons under the influence of alcohol or narcotics shall not be permitted on the job").

Respondents have merely endorsed one side in the split among the Circuit Courts. This is not a basis for denying the Petition.

D. By Addressing The Splits Among The Circuit Courts, This Court Would Redress Petitioner's Injuries.

Finally, Respondents contend that the Tenth Circuit "did not reject the expanded public policy relied upon by the First Circuit in *Exxon Corp.*" but merely "question[ed]" whether the policy could be "squared" with Supreme Court precedent. (Opp. at 7.) The Tenth Circuit not only questioned, but also rejected the rulings of the First, Third, Fifth, Eighth and Eleventh Circuit Courts on the ground that the rulings did not identify a public policy violated by the grievant's reinstatement. (App. 9a-10a.) The Tenth Circuit reached this conclusion in reliance upon the rulings of the Second and Ninth Circuits that the only relevant public policies would be those that make reinstatement illegal. (App. 9a.) Therefore, by resolving the two splits among the Circuit Courts, this Court would directly redress the Tenth Circuit's erroneous rulings below.

III.

THE TENTH CIRCUIT'S DECISION CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT IN HOLDING THAT THE AWARD DRAWS ITS ESSENCE FROM THE COLLECTIVE BARGAINING AGREEMENT.

Respondents have provided no compelling response to Kennecott's arguments that the Tenth Circuit failed to follow relevant rulings of this Court. Respondents assert that the arbitrator interpreted the CBA and the Memorandum of Understanding ("MOU"). (Opp. at 8.) They provide no record citation for this interpretation. In fact, the Arbitrator's crucial decisions concerning the application of the bargained drug-free workplace policy were not interpretations of the

CBA and MOU. (*See* Pet. at 18-21.) The Arbitrator interpreted the MOU only by noting that: (a) Kennecott and the Union agreed to the terms of the MOU (App. 29a); (b) the MOU prohibits "[w]orking . . . while not being free from the presence of drugs" (*id.* 25a); (c) compliance with the MOU is "a condition of employment" (*id.* 26a); and (d) the MOU "clearly indicates the intent of the Company to take disciplinary action for violation, includes [sic] termination." (*Id.* 29a.) Beyond this, the Arbitrator said nothing about the MOU or Kennecott's claims to discretion under the MOU. Instead, the Arbitrator ignored the terms of the MOU he earlier recognized, and, relying on his own opinions as to the appropriate use of drug tests, imposed his own requirement that Kennecott could *discipline* an employee only for on-the-job drug use. (Pet. at 22.) The Award fails to draw its essence from the CBA and MOU, and the Tenth Circuit failed to follow the relevant rulings of this Court in enforcing the Award.

CONCLUSION

For the reasons stated above, Petitioner Kennecott Utah Copper Corporation respectfully requests that the Court grant its Petition for a Writ of Certiorari and coordinate the further processing of this case with that of *Eastern Associated*.

Respectfully submitted,

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